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THE LAW MAGAZINE AND REVIEW.

No. CCLXII.—NOVEMBER, 1886.

I.—ENGLAND'S WORK IN EGYPTIAN LAW REFORM.

SINCE the period when England actively intervened in the affairs of Egypt, and pledged herself to establish there a stable government, the people of this country have become more than ever concerned in all that may conduce to the well-being of the land of the Pharaohs. No apology, therefore, is needed for drawing the attention of our readers to the Judicial Reforms inaugurated under England's auspices, and designed to re-awaken in the minds of the Egyptian population those fundamental conceptions of right and wrong which centuries of injustice had almost wholly obliterated. In judging of the results which have already been attained, it should not be forgotten that at the time when England took upon herself a preponderating share in the counsels of Egypt, that country was racked by internecine feuds and religious animosities, which had paralysed her energies, and reduced her to a state bordering on social anarchy. It was the common law of humanity, the primary and fundamental moralities, the elementary conditions of emergence from barbarism that our intervention was called upon to vindicate. If, then, the progress made in the path of reform has not been so rapid or complete as some too sanguine critics had been led to anticipate, and if, as we shall presently endeavour to shew, the existing administration of Justice is in certain respects defective, allowance ought in fairness to be made for the enormous difficulties of the task which we had undertaken.

Admittedly, the present system is susceptible of further amelioration, but even when all its imperfections are taken into account, it marks an immeasurable advance upon the chaos of crime, chance, and arbitrary punishment which it superseded.

Under the system which has to some extent disappeared a certain semblance of order was maintained by ruling with a strong hand, and some of the Viceroys developed the material resources of the country in order to obtain the pecuniary means required for realising their ambitious schemes, nowise identical with the interests of Egypt ; but no serious attempt was ever made to replace the wholesale, indiscriminate, arbitrary use of the bastinado by even-handed justice, or to supplant in the people the feeling of slavish fear by some higher motive for loyalty. Of the Judges, not one in a dozen ever received an elementary judicial education, or a decent education of any kind, and as for their uprightness, the idea of a judge on Egyptian soil being incorruptible probably never dawned on the Egyptian mind. Any clear judicial conceptions which may have existed in the time of the early Arab dynasties had been long ago undermined if not altogether effaced by the traditional and systematic venality, brutality, and mendacity which permeated the judicial hierarchy. The *Cadi* in Civil and the *Mahmour*, or *Mudir*, in Criminal cases, professed to deal out justice to the native population in consonance with the tenets of the Koran, but in reality their decisions violated all rules save those dictated by ignorance, prejudice, and superstition. The tribunals of the *Cheri*, if they ever commanded the respect of the Egyptians, had long ago forfeited it by the corruption and abuses in which they indulged.* The wholesale bribery of Court

* See *The Modern Egyptians*, by E. W. Lane. London. 1860. pp. 110-18. *Egypt and the Egyptian Question*, by D. Mackenzie Wallace. London. 1883. p. 450. *Parl. Papers, Egypt*, No. 7. 1883. p. 6.

Officials, poisoning Justice at its source, and inflicting incalculable hardship upon the poorer class of litigants, was so universally practised that it had come to be regarded rather in the light of a system of legal Court fees than as one of extortionate exactions. The truth is that the native Law Courts, like other branches of the administration—though some of them were Europeanised in external appearance—preserved in reality the worst characteristics of Oriental despotism. As to respect for the Law, the existence of any such feeling was a physical impossibility; for Egyptians like other people can only respect what exists, or what at least they believe to exist, and no one indulged in the pleasing illusion that there was any Law in Egypt so far as the natives were concerned.

As regards foreigners, it is true, a different state of things existed, but one which was hardly less inimical to the best interests of the country. Over them, in Criminal matters, the Native Tribunals possessed no authority whatsoever, and in Civil proceedings their jurisdiction was confined to the single case of an action instituted by a foreigner against a native.* By a native is meant an Egyptian subject, whatever his origin or religious belief. In all other instances, foreigners were subject only to the jurisdiction of the Consuls.

This Consular jurisdiction had its origin in Treaties, or "Capitulations," as they are generally called, between the Mahometan Oriental nations and the Christian Western Powers. These Capitulations were not at first regular Treaties, but personal concessions, revocable at the will of the grantor and expiring at his death. Records of something resembling them are to be found as early as 1150;

* See *Revue de Droit International* (Brussels). 1876. p. 582, Art. *La Question Judiciaire en Egypte*. *Judicial Organisation in Egypt and its Reform*, by Nubar Pasha, with Appendix by Maunoury. London. 1868. pp. 7 and 17.

but it would appear that the first States of Europe to enter into regular Treaty stipulations with the Ottoman Dynasty in Europe were Genoa and Venice, the Capitulations with which were first made on the capture of Constantinople in 1453, and were several times confirmed and amplified within the same century. Those with France followed next in order, dating from 1528. England had no direct commerce with the Levant deserving attention until the end of the Sixteenth century. In 1579, Queen Elizabeth obtained from Sultan Murad permission for her subjects to trade freely in the Ottoman Empire, like the Venetians, the French, the Poles, and the subjects of the German Emperor. The document embodying this concession is described by Hackluyt as "the letters sent from the Imperial Musulmanlike highnesse of Zuldán Murad Can to the sacred regall Maiestie of Elizabeth, Queen of England, the fifteenth March, 1579," containing the grant of the first privileges. Holland was the next European power to obtain similar privileges in 1598. Russia had entered into treaties of commerce with the Byzantine Emperors; but the Czars had no relations with their Ottoman successors until the eighteenth century, and it was as recently as 1711 that a Treaty of Commerce was made between the two Powers. Soon afterwards, in 1720, the Russians obtained permission of the Porte to have an Ambassador resident at Constantinople; and a Treaty made in 1783 may be considered as the foundation of the Capitulations in their favour. Not to take up space with the intermediate dates of negotiations with less important European Powers, the list of Capitulations closes with the Treaty made between the United States and the Ottoman Porte in 1830, enlarged and confirmed by a later Treaty concluded in 1862. The sum and substance of the Capitulations, as applied and understood in Egypt, has been reduced to nine principles by the learned Italian Jurist, Gatteschi, many years resident

in that country.* In a condensed form they may be stated as follows :—

1. Liberty for the Franks to enter Mussulman territory, to navigate its seas and use its harbours, whether for pleasure, religious pilgrimage, or health ; or for trade, in the importation and exportation of articles not prohibited.

2. Liberty for the Franks to possess land for their own use and habitation, and to perform the rites of their own religion.

3. Exemption from all Taxes and imposts, except the stipulated duties on merchandise.

4. The right of Franks to be tried by their own Ministers or Consuls in their controversies, whether Civil or Criminal ; and the obligation of the local authorities to give forcible assistance (*prestar man forte*) to the Consul, if called upon, for the execution of his decision.

5. In Civil cases between natives and foreigners, many of the Capitulations reserve the jurisdiction for the local Tribunals, but with various guarantees, such as, that the case must be heard in the presence of the Consular dragoman ; that the Ottoman Judge must not give ear to the native, unless he has proof in writing of his defence to a claim ; and, finally, that if the amount in issue exceeds a specified sum, the case must be referred to the Imperial Divan.

6. In cases of crimes or offences by a foreigner against a native, the jurisdiction is reserved to the local authorities, but always to be exercised in the presence of the Consular dragoman ; and the more recent Capitulations allow the jurisdiction to the Consul, even in Criminal cases of this nature.

7. Inviolability of the foreigner's domicile. In cases of urgent necessity for making an arrest, the obligation lies

* *Manuale di Diritto Pubblico e Privato Ottomano*. Compilato dal Dottor Domenico Gatteschi. Alessandria di Egitto. 1865.

upon the local officer not to enter the house of a foreigner without notice to his Minister or Consul, and without being accompanied by some person in behalf of the latter.

8. Absolute liberty to a foreigner to make a will. In case of an intestate estate, the obligation lies upon the local authorities to allow the heirs and the Consul to collect the assets without hindrance ; and, if either be absent, to collect them without charge, and hand them over to the heirs.

9. Prohibition to Ministers and Consuls to give protection to Ottoman subjects, or to *rayahs* (native Christians) or to permit the use of their flags to Ottoman or *rayah* vessels.

The Western nations which are represented by Embassies or Legations at the Porte have supplied, in such manner as seemed fittest to each, the necessary authority for their Ministers and Consuls in the various portions of the Ottoman Empire to exercise the powers placed in their hands by the Capitulations. As regards the United States, this has been done by Acts of Congress, passed in 1848, 1860, and 1866. The rules for the British Consular Courts were framed under an Order of the Queen in Council, and approved by one of Her Majesty's Principal Secretaries of State. They form a comprehensive, though compact, Code of Procedure.* Besides Great Britain, but two others of the European Powers (namely, France and Italy) make appointments in the Consular service of the Levant with special reference to the Judicial duties ; and, by these Powers, such appointments are made only at a few of the most important places. In the other Consulates, the Judicial business is done, as best it may be, by the ordinary staff. The condition of affairs Judicial, which had grown into existence under the practical operation of the fourth, fifth and sixth principles of the Capitulations,

* *American Law Review*. Boston. 1875. pp. 440 *seqq.* See further, *L'Egypte et sa Réforme Judiciaire*. Paris. 1875. *Guide Pratique des Consulats*, by De Clercy and Vallat. Paris. Second Edition. 1858.

according to the enumeration in the summary already given, was described as follows, in an official Report made in 1870, signed by Nubar Pasha, then Minister of Foreign Affairs in Egypt, and by the representatives assembled at Cairo, of seven Western Powers, viz., the United States, Austria, France, Germany, Great Britain, Italy, and Russia :—

“ Besides the local tribunals, there are in Egypt sixteen
 “ or seventeen Consulates, which have the right to juris-
 “ diction over the persons and property of the people
 “ of their respective nationalities. Then, in the existing
 “ state of things, the rule universally followed for compe-
 “ tency of jurisdiction in civil and commercial matters is,
 “ that the defendant must be summoned before his own
 “ Court; that is, the native before the local Tribunal,
 “ and the foreigner before the Court of his Consulate. It
 “ is the absolute application of the rule, *Actor sequitur*
 “ *forum rei*. The usage is, moreover, that each Court
 “ applies a different legislation, and proceeds to judgment
 “ according to its own rules of Procedure.”

The demoralisation of the Native Courts and the complications arising from the multiplicity of Consular jurisdictions resulted in a state of things which was in the last degree deplorable. Indeed, Lord Dufferin, whose qualifications and opportunities peculiarly fitted him for forming an accurate estimate of the Legal Institutions of the country, pronounced them to be a “mockery.”* Both the English Government and the Egyptian, acting under its guidance, were persuaded that the restoration of social order, the protection of legal rights against lawless tyranny, the deliverance of the *fellah* from the thralldom of his oppressors, the abolition of the *Kourbash* (arbitrary infliction of corporal punishment) and the extinction of the demoralising *Corvée*

* See his General Report, *Parl. Papers, Egypt*. No. 6. 1883. p. 50.

(forced labour) could only be effectuated by the promulgation of humane, enlightened, and uniform laws, wisely and impartially enforced. Hence the introduction, at the latter end of 1883, of the Civil, Commercial, Penal and Procedure Codes, followed in the early part of 1884 by the reorganisation of the Tribunals.*

The enactment† regulating the reconstitution of the Tribunals established three of First Instance, at Alexandria, Cairo, and Zagazig.‡ Each of these is composed of seven Judges: four foreigners and three natives. In Commercial cases, two merchants, one foreign and one native, are called in to take part in their deliberations. Alexandria possesses in addition a Court of Appeal, with eleven judges, seven of whom are foreigners and four natives. These Mixed or International Tribunals, as they are called, have in some measure superseded the jurisdiction both of the native Courts and of the Consuls. They possess exclusive cognisance of all Civil and Commercial disputes not involving Status, Succession, or Guardianship, whether arising between natives and foreigners or between foreigners of different nationalities.§ They are competent to determine all actions relating to Immoveables between all persons whatsoever, even though belonging to the same nationality. The Government, the Administrations, and the *Dairas* of the Khedive and the members of his family, in cases where foreigners are concerned, are likewise

* In an entertaining monograph entitled *Nubar Pacha devant l'Histoire* (Paris. Dentu. 1886), M. Alexandre Holynski throws considerable light upon the past and present administration of Justice in Egypt, and to him we are indebted for much interesting information concerning the Courts of Law and the projects of reform initiated by Egypt's present Prime Minister.

† *Règlement d'Organisation Judiciaire pour les Procès Mixtes*. Tit. 1., Ch. 1., Sect. 1., Arts. 1., *seqq.*

‡ The tribunal at Zagazig has since been removed to Mansourah.

§ *Règlement d'Organisation Judiciaire*, Art. 9. *Code Civil [Egypte]*, Arts. 4 and 5.

amenable to their jurisdiction;* Religious establishments and foundations (*Vakoufs*) being, by reason of their sanctity, alone exempt. Furthermore, these Tribunals are empowered to try foreigners for petty offences (*contraventions de simple Police*) and, in addition, for specified offences committed by or against Judicial officers, in or connected with the exercise of their functions.† Such delicts [*délits*] as these Tribunals are competent to try are sent before the *Tribunal Correctionnel*, which is composed of three Judges, one native and two foreign, assisted by four foreign Assessors. Similarly constituted is the *Chambre de Conseil*,‡ the functions of which resemble those of the *Chambre de Mise en Accusation* of the French system.§ The gravest offences [*crimes*] of which these Tribunals have cognisance are remitted for trial to the Court of Assize, consisting of three members of the Court of Appeal—one native and two foreign—and a Jury of twelve, all of whom must be foreigners of not less than thirty years of age and who have resided in Egypt for a year. The Jury list is drawn up annually by the Consular Body, and contains 250 names, each nationality furnishing not less than 18 and not more than 30. From this list the Consular Body also draws up a list of Assessors, of whom a minimum of 6 and a maximum of 12 are supplied by each nationality. Upon the demand of the accused, half of the Jury or Assessors who are to try him are required to be selected from his own nationality. All trials are held in open Court. They may be conducted in the languages of the country, or in Italian or French. It is somewhat curious that though the reconstruction, and, it may be, the continued

* *Règlement*, Art. 10. *Code Civil*, Art. 7.

† *Règlement*, Tit. II., Arts. 6—10

‡ See *Code d'Instruction Criminelle*, Arts. 115—130.

§ For which see *Law Magazine and Review*, No. CCL., for Nov., 1883. Art. *French and English Criminal Procedure*.

existence of the International Tribunals, is mainly due to England's initiative, the English language has not hitherto been raised to the proud position of a *langue judiciaire*.* The Judges of these Courts are appointed by the Egyptian Government, and hold office for five years.† Indeed, the whole system of Mixed Tribunals is subject to revision at the end of that period.‡ In order that their independence may be placed above suspicion, the Judges are prohibited from following any salaried calling, or engaging in commerce. The Government is represented at these Tribunals by a *Procureur Général*, or his deputies, all of whom are appointed and removeable by the Khedive. Only those advocates who have received diplomas are entitled to plead before the Court of Appeal, whilst in the Courts of First Instance, the parties themselves or their non-professional nominees have a right of audience. By a Decree of 14th June, 1883, there were established the Reformed Natiye Courts—so-called to distinguish them from the old Courts of the *Cheri*—wherein the official language is Arabic. These are reserved for the trial of offences committed by natives not cognisable by the Mixed Tribunals, and for the determination of Civil actions between them. Indigenous Courts of First Instance were appointed to be held at Cairo, Benha, Tantah, Mansourah, Alexandria, Beni-souef, Siout, and Kehmah, constituted of five Judges each, three forming a quorum, and two Courts of Appeal—one at Cairo, and the other at Siout,—consisting of eight Judges each, five forming a quorum.§ It remains to mention the Special

* So it stands on the surface of the Codes. But from an article in the *Gaulois*, of November 2nd, 1886, it would seem that this position has been given to the English language.

† *Règlement*, Art. 19.

‡ *Ibid.*, Art. 40. By Decree of Jan., 1884, it has been continued for another quinquennial period. See *Ann. de Lég. Etr.*, 1885, p. 743.

§ Arts. 5, 6, 9, and 10 of Decree of 14th June, 1883. *Parl. Papers, Egypt*, No. 22. 1883. pp. 58 *seqq.*

Commissions created by the decrees of April and October, 1884,* for the suppression of brigandage, composed of four non-professional members and one lawyer, and presided over by a *Mudir*.

"With the re-constitution of the Courts," writes Nubar Pasha, "a new era was opened up for Egypt: a novel idea " was imported into the East, namely that of Justice " organised upon an independent basis, executing the " decrees of a Government which in its turn is subservient " to the Law. Oriental nations for the first time in their " history witnessed the spectacle of a regular and orderly " Government, which in the assertion of its rights recog- " nised its correlative obligations."† All impartial critics will readily endorse these views, but, extensive as has been the improvement, a great deal more remains to be achieved before the administration of Justice can be considered to rest upon a sound, rational, and efficient footing.

No one is more alive to this than Nubar Pasha himself. Indeed, he does not disguise the fact that the Native Tribunals owe their continued existence to a too tender regard for Ottoman susceptibilities, as well as to a desire on the part of the Khedive to maintain intact his absolute power over his Egyptian subjects. So little confidence, however, is reposed by the natives in their own Courts that they will resort to any subterfuge in order to bring themselves within the competency of the Mixed Tribunals. It was sought to engender a spirit of purity and independence amongst the native magistracy by infusing into the indigenous Tribunals a European element, and to this end Judges were selected from the Justiciaries of Holland, Belgium, and Switzerland, but from all accounts which have reached this country it would seem that the servility and corruption

* See *Parliamentary Papers, Egypt*, No. 25. 1884. p. 23; and No. 15. 1885. p. 30.

† *Nubar Pacha devant l'Histoire*, pp. 63-4.

ingrained in Oriental habits and traditions have hitherto presented an insuperable obstacle to the success of this laudable endeavour.* An extension of the jurisdiction of the Mixed Tribunals to all the inhabitants of the State would confer upon natives a privilege enjoyed by foreigners, but which is at present denied to them, except in the instances already specified.† Such a change, if pursued to its logical consequences, would also have the salutary effect of sweeping away the Consular Courts and the Special Commissions, both of which are mischievous anomalies, impairing the authority of the Law and bringing it into odium. Since the year 1875, by virtue of an International Agreement, a certain amount of Civil and Commercial litigation, in cases where foreigners are concerned, has been confided to the jurisdiction of the Mixed Tribunals. At the time of the institution of these Courts, it was considered prudent not to extend their jurisdiction to Criminal cases until experience had shewn that they could administer Civil and Commercial justice to the satisfaction of those concerned. Criminal offences, therefore, committed by foreigners, or of which foreigners are the victims,

* A very recent encouraging sign of their regeneration is recorded in *The Times*, for October 13th, 1886, reporting the condemnation of a high native Pasha, the present Director of Railways, by a Native Court, to a term of six months' imprisonment for assaulting an officer of the Court, which sentence has been confirmed on appeal.

† See *The Future of Justice in Egypt*, by H. A. Perry. London. 1881. p. 32. As a recent illustration of the high importance and value of the Mixed Courts we may refer to the case of M. Lavison, a Russian subject, who, assisted by an armed body of Albanians, broke into the outbuildings of the Khedive's palace, known as Ismailia, in Cairo, on the 26th September last, asserting his right to possession thereof in the name of "the Khedive Ismail," and proceeded to destroy part of the outbuildings. Under the old *régime* this open act of violence could only have been dealt with by the Russian Consulate, whereas, in virtue of the new order of things, the matter is about to be brought before the International Courts.—See *The Times*, October 13th, 1886. We learn since that the Court of First Instance has dismissed M. Lavison's claim.

as well as Civil actions where foreigners are litigants, except in the above-mentioned instances, are still tried by the several foreign Consular Courts. Such an arrangement, producing as it does continual friction, and a deplorable conflict of jurisdiction, is a standing impediment to the maintenance of the supremacy of the Law.* Nor, indeed, would the exercise of this exceptional jurisdiction be tolerated in any independent country, seeing that it admits by implication the incompetence of Egypt to dispense Justice which shall be acceptable to the sentiments of foreign Powers. The inability of the Consuls to track out offenders or enforce their decrees, the endless delays which proceedings in their Courts and appeals thence to Courts in foreign lands entail, the diversity of their laws and procedure, and the impossibility of securing convictions for offences against public revenue and morality, such as the circulation of false money, usury, and the keeping of gaming establishments, afford many avowed criminals complete immunity from punishment.† If, then, the course of Criminal Justice is not to relapse into utter impotence, and if such guarantees for public order and security as exist in other countries are not to be abandoned in Egypt, it will be essential, it would seem, to abolish the Capitulations altogether. So long as foreigners, forming as

* *Etude sur le projet de Réforme Judiciaire en Egypte*. L. Renault. pp. 12—15.

† See *Rapport des Consuls Généraux sur l'état de l'Organisation Judiciaire en Egypte*, Jan. 17, 1870; *Parliamentary Papers, Egypt*. No. 6, 1883. p. 74. *Judicial Organisation in Egypt and its Reform*, by Nubar Pasha and Maunoury, pp. 10 and 28. Amongst the numerous reforms which owe their origin and prosecution to the English Administration not the least important or beneficial is the introduction of a simplified and uniform system of coinage, the carrying out of which, however, is hindered by the absence of Criminal jurisdiction over foreigners. A foreign subject may issue false coins in Egypt with practical impunity so far as the Egyptian Government is concerned. He can only be condemned by a tribunal of his own country, which presumably feels little interest in protecting the Egyptian coinage, and is necessarily hampered by the absence of primary evidence.—See *The Times*, September 25th, 1886.

they do the richest and least law-abiding section of the community, remain beyond the reach of the Law of the land, it were unreasonable to expect that any reform can be either complete or permanent.* Of course a proposal of this kind can only be carried out by the agreement of all the various Powers, and, hitherto, International rivalries have frustrated its attainment. So long ago as 1867, Nubar Pasha conceived the project of fusing the multifarious jurisdictions of Egypt into one, and with this object in view he addressed a note to the former Khedive, Ismail, who communicated it to the Ambassadors of the Powers at Constantinople.† With much shew of reason it was urged by the Minister that the Consuls had usurped functions which, so far from being in accordance with the Capitulations, violated both their letter and spirit,‡ but he only succeeded, after many abortive attempts, in inducing the various Governments to relinquish to a small extent the jurisdiction of their representatives. Since the Mixed Tribunals have established their reputation in the popular estimation, he has persistently represented to the Powers the advantages that would accrue by investing them with an amplified jurisdiction, and it is to be hoped that his beneficial recommendations may be speedily adopted.§ At any rate, if the principle be well founded that Justice,

* *Parliamentary Papers, Egypt.* No. 24, 1884. p. 22. *Ibid., Egypt.* No. 5, 1886. pp. 30—32.

† See *Documents Diplomatiques* (Ministère Français des Affaires Etrangères), Nov., 1869, pp. 77—83.

‡ *La Réforme Judiciaire en Egypte et les Capitulations.* Alexandria, 1874. This work, though published anonymously, was inspired by the Egyptian Government. *Etude sur le projet de Réforme Judiciaire en Egypte*, by L. Renault, p. 11. *Jud. Organisation in Egypt and its Reform*, by Nubar Pasha and Maunoury, pp. 9 and 10. *Parliamentary Papers, Egypt.* No. 5, 1886. p. 37.

§ To the same effect see *L'Egypte et l'Europe par un ancien Juge Mixte.* (Preface signed Boutros.) Paris. 1881. Vol. I., p. 296

whilst emanating from the Executive should be independent of it, complete separation of the Judicial and Administrative functions should be at once decreed.

From the recently-published Report* presented to the Egyptian Government by the late *Procureur Général*, it would appear that the Special Commissions, both as regards their constitution and method of procedure, are also highly objectionable. By them, the ordinary rules which govern Criminal proceedings are entirely discarded. They appear to arrogate to themselves the combined functions of Prosecutor, Judge, and Jury. The forms and delays devised to give a prisoner a fair chance of disproving false accusations find no place in their system. No postponement is allowed to enable him to disprove false testimony given against him. Evidence is taken in his absence and secretly. He has no right to employ an advocate, much less to have one provided for him by the Court. As soon as the preliminary investigation has terminated, the *Procès-verbal* is read in open Court, in the presence of the accused, who is immediately called upon to make his defence. Then comes instantaneous judgment, without deliberation, and with no statement of reasons except such as the President may deem judicious, followed by execution of sentence within twenty-four hours, which, in the case of capital punishment, is delayed until the sanction of the Khedive has been obtained. But this is not all. By a decree of December 27th, 1884, the Report goes on to affirm, any person of suspicious antecedents may, without being charged with any definite offence, be enrolled by the Commission in a "Company of Discipline," and transported for an indefinite term to the coasts of the Red Sea, or to the Soudan, or any other destination that may be deemed desirable by a Court constituted, in such cases, of the *Mudir* and two landowners of the district. By orders

* See also *Parl. Papers, Egypt*. No. 1, 1885. p. 32.

issued under cover of this decree, aged men and boys have been condemned, whose antecedents, it is alleged, can hardly afford a serious probability of future crime. Persons suspected, and whom it is convenient to get out of the way, though sufficient evidence cannot be procured against them to secure a conviction by the ordinary tribunals, are simply sent by the Commission unconvicted, but on remand, to the ordinary gaols, where they are kept imprisoned without any limit being assigned to their confinement. It is, indeed, almost inconceivable that a system characterised by and stereotyping some of the worst vices of the Inquisition should have been allowed to grow up in Egypt during the period of English intervention, and it behoves us, as a Nation which has incurred such serious responsibilities in that country, to put a speedy end to so monstrous a travesty of Justice.

Whether or not, in accordance with Nubar Pasha's proposals,* the International Tribunals are destined to absorb those termed "Indigenous," or whether Lord Dufferin's recommendation to retain and develop the latter as an eventual substitute for the Foreign institution be the policy ultimately pursued, it is imperative that modifications in the composition and Procedure, alike of the Mixed and of the Native Tribunals, should no longer be postponed. Economy in Judicial strength by reducing the multiplicity of Judges required to sit together, thus enabling the number of Courts to be increased, is one of the first alterations which should be made. This observation applies with especial force to

* The expediency of this reform has been strenuously combated in the following writings. The anonymous *L'Egypte et sa Réforme Judiciaire*. Paris. 1875. Art. of M. Gabriel Charmès in the *Revue des Deux Mondes*, 15th Nov., 1880. *Les Justices Mixtes dans les pays hors de Chrétienté*, by M. Féraud-Giraud. Paris. 1884. A different scheme has been propounded by M. Martin-Sarzeaud, of the Court of Appeal, Alexandria, in his *Réforme Judiciaire en Egypte*. Art. in *Journ. de Dr. Int. Privé*. Paris. 1886. p. 270.

the Native Courts, to which hitherto the bulk of the Criminal cases have been relegated. So considerable are their arrears that it has been found necessary to relieve them both of petty cases and of important ones, by their transference to the Special Commissions. Even thus lightened they cannot keep pace with the work, and the gaols contain unconvicted and presumably innocent prisoners who have been waiting for trial for, it is said, over two years.

It is matter for regret that the preparation of the Codes of Civil and Criminal Procedure for both Mixed and Native Courts should have been entrusted to native and foreign officials who, almost without exception, had been trained solely in the Continental School of Jurisprudence, and who consequently were disposed to look upon the models furnished by the *Code Napoléon* not merely as logically and symmetrically perfect, but also as practically applicable to all conditions of human society. Accordingly, they set to work in this sense, contemptuously disregarding alike the situation and circumstances of the country, the manners and customs of the people, their strong permanent instincts, and their distinctive marks of character.

Experience has necessarily shewn that the system elaborated by them is too cumbrous, complicated, dilatory, and costly for convenient application to the case of the *fellah* population,* and the opinion seems to be gaining ground that it would have been wiser, in the first instance, to have adopted the more elastic and practical English or Anglo-Indian Procedure. It has been found that the admission in Criminal cases of the *partie civile*, claiming damages, is a source of complication which seriously embarrasses the

* *L'Egypte en Europe par un ancien Juge Mixte*, p. 310. See also Lord Dufferin's Report, 1883, *ubi supra*, and *Parliamentary Papers, Egypt*. No. 5. 1886. p. 33.

proceedings. The necessity, too, for obtaining the sanction of the *Procureur Général* before a prosecution for the most trivial offence can be set on foot, does not conduce to the expeditious repression of crime. Other serious blots on the system are the elaborate formalities with which the preliminary investigation is overburdened, its privacy,* the interrogation of the prisoner with a view to his self-incrimination, the right of audience accorded to non-professional advocates,† the laborious process of executing sentences, whereby the moral effect of punishment following swiftly and surely is in a great measure lost, and the excessive power of appeal, which, owing to the advantage of suspension of the sentence gained by the appellant, encourages applications of a purely frivolous character.

Notwithstanding the salient imperfections in the present system which we have felt called upon to point out, much real progress in the path of reform has already been accomplished. We should remember that abuses die hard, and nowhere harder than in Egypt, where they have been consecrated by antiquity, habit, tradition and education. The presence of English administrators in Egypt, controlling its finances, re-organising its army and police, and endowing it with a certain measure of representative institutions, is exerting a beneficent and purifying influence upon the official classes, and tending to inspire them with a consciousness of their obligations towards and respect for the rights of private individuals. Englishmen can never forget that they are chiefly indebted for the atmosphere of freedom, order, and legality in which they live, to a judicial system enabling the poorest and humblest in the land fearlessly to assert and defend whatever rights of theirs may be imperilled. This is the lesson gathered from our own experience, which we are

* *Parliamentary Papers, Egypt.* No. 5. 1886. p. 34.

† See *Parliamentary Papers, Egypt.* No. 15. 1885. p. 66.

endeavouring to inculcate upon the downtrodden races of Egypt. It is from independent and impartial Tribunals, much more than from Ministers and heads of Departments, that any genuine and essential amelioration in the condition of that country may be expected to proceed. The Courts alone, as Nubar Pasha has justly declared, can create and foster a healthy public opinion ; the Courts alone can, for a time, fulfil the ordinary functions of a free Press. To give to them the necessary moral strength to enable them to resist official pressure of every description is one of the great difficulties with which we have hitherto had to contend. Centuries of wrong, oppression, and extortion have reduced the natives to so abject a state of servility and corruption that a considerable influx of the European element will be required to act as a leavening influence. Even thus reinforced, the native Tribunals cannot be expected adequately to fulfil their functions unless they receive for a lengthened period very energetic support from the English Government.*

Let us, then, endeavour to recognise the attitude which England clearly ought to adopt towards Institutions called into being by herself. With the assent and approbation of Europe we embarked upon an enterprise of which everyone admitted the necessity, though no one was willing to undertake it but ourselves. Any attempt, therefore, on our part to evade the responsibility thus incurred would expose us as a nation to the charge of moral cowardice and perfidy. At a juncture like the present, when envious, it may be, of a partial success in which she might have shared, France, more or less openly abetted by Russia, and countenanced by new combinations of Palace intrigues at the Porte, is bent upon making Egypt once more a bone of European contention by challenging our continued occupation, it may be well to recall the views so emphatically put forward

* See *Egypt and the Egyptian Question*, by D. Mackenzie Wallace, p. 461.

in Lord Dufferin's comprehensive Report. "It is absolutely necessary," he says, "to prevent the fabric we have raised from tumbling to the ground the moment our sustaining hand is withdrawn. Such a catastrophe would be the signal for the return of confusion to this country [Egypt], and renewed discord in Europe. At the present moment we are labouring in the interests of the world at large. The desideratum of everyone is an Egypt peaceful, prosperous, and contented, able to pay its debts, capable of maintaining order along the Canal, and offering no excuse in the troubled condition of its affairs for interference from outside But the administrative system (and this is especially true as regards the indigenous Courts of Justice and the new Political Institutions) must have time to consolidate, in order to resist disintegrating influences from within and without, to acquire the use and knowledge of its own capacities. If the multiform and balanced organisation we have contrived is to have a chance of success, it must be allowed to operate *in vacuo* The situation of the country is too critical, the problems pressing on the attention of its rulers are too vital to be tampered with, even in the interests of Political Philosophy The stability of our handiwork will not be assured unless it be clearly understood that no subversive influence will intervene between England and the Egypt which she has re-created."

The path of duty thus mapped out lies clearly before us. Having demolished the old despotic system of administration, solemnly pledging ourselves, at the same time, to follow up the work of destruction by a work of reconstruction, not alone our own interests and the International interests committed to our charge, but our honour as a nation, and our prestige as a Civilising Power, alike demand that we should for some time to come extend to the new Egyptian

Institutions our active guidance and support.* A premature evacuation would be the dereliction of a duty which, though self-imposed, is none the less obligatory. Conceding that Her Majesty's Government and the public opinion of England have pronounced against a Protectorate, yet, nevertheless, a loyal discharge of our responsibilities points to the necessity of prolonging for a considerable time the British occupation. England will not, we are convinced, voluntarily betray her trust. We will not believe, unless compelled by the stern logic of accomplished facts, that she will be weak enough to listen to those perverse or interested counsels which urge her to depart from Egypt whilst her promises remain unfulfilled, her pledges unredeemed, since, in withdrawing her protecting ægis from the defenceless subject races, she would inevitably be handing over anew to the lawless tyranny of their former persecutors those who count upon her fidelity, who look to her for deliverance. Bearing in mind how much has already been achieved, under circumstances of unparalleled difficulty, through the zeal and patriotism of Egypt's present rulers, and in the confident anticipation that England will still continue to second the honest endeavours which are being made to assure public tranquility, to protect life and liberty, and to enforce the authority of the Courts in whose reconstruction she so largely participated, it were not

* In a letter to the writer from an impartial and disinterested observer of our work in Egypt, recently returned from a lengthened sojourn in that country, the following significant passage occurs:—

"Il appartient à la Grande Bretagne, la plus civilisatrice des puissances Européennes, de relever de leur abjection séculaire plusieurs millions d'hommes qui lui tendent des bras suppliants. Ce sera une glorieuse tâche et une noble réponse aux nations jalouses qui posent chaque jour la question: 'Que faites vous en Egypte?'—'J'y suis et j'y reste,' pourra dire la Grande Bretagne, 'moins pour garder la clef des Indes, comme c'est mon droit, que pour réhabiliter la dignité humaine, comme c'est mon devoir.'"

utopian to look forward to a time when the Laws of Egypt and their administration shall vie with those of the most enlightened of European nations.

B. L. MOSELY.

October, 1886.

P.S.—In face of the disquieting rumours which have recently been rife, the explicit declaration of policy enunciated by Lord Salisbury at the Mansion House Banquet on November 9th, is most reassuring.

“ Our stay in Egypt, as you well know, has been held by
 “ Governments of all colours to be limited in duration;
 “ but the limit is not a limit of time, it is a limit of the
 “ work which we have to do. We have bound ourselves by
 “ pledges, so distinct and so repeated that we could not
 “ retreat from them with a shred of honour, not to leave
 “ that country until we give it security from foreign aggres-
 “ sion, and until we have a sufficient foundation for hoping
 “ that anarchy and confusion will be prevented from arising
 “ in its domestic affairs. We have been engaged in a task
 “ —a task to which I am sure every English Minister will
 “ address himself with zeal—of bringing that end nearer.
 “ We believe that that country is distinctly making an
 “ advance. . . . We believe that the progress which
 “ has been made is real, but we have not as yet attained
 “ the point where we can say for certain that we know at
 “ what moment our task will cease. We feel that the pros-
 “ perity and the independence of Egypt, apart from the
 “ influence of any other external Power, is a vital matter
 “ for the policy of this country.”

II.—PARLIAMENT AND THE CONSTITUTION.*

“IT were better,” remarks Professor Dicey, “as things now stand, to be charged with heresy, or even to be found guilty of petty larceny, than to fall under the suspicion of lacking historical-mindedness” . . . but “what one may assert,” he continues, “without incurring the risk of such crushing imputations, is that the kind of constitutional history which consists in researches into the antiquities of English institutions has no direct bearing on the rules of Constitutional Law in the sense in which these rules can become the subject of legal comment. Let us remember that antiquarianism is not law, and that the function of a trained lawyer is not to know what the law was yesterday, still less what it was centuries ago or what it ought to be to-morrow, but to state and explain what are the principles of law actually existing in England during the present year of grace,” 1886, 49 & 50 Vict.

At first sight, this does not seem a very remarkable or astonishing statement, nor yet one difficult to believe or hard to understand. On the contrary, it almost wears the familiar aspect of a well-known truism. The inexperienced reader might even be prompted to exclaim, *cela va sans dire*, and irreverently “skip” the rest of the learned Professor’s extremely interesting and valuable explanation of the shortcomings of his predecessors and the mode in which he proposes to offer a remedy. But to those who have had any real experience of the difficulties which beset the path

* *The Law of the Constitution*. By A. V. DICEY, B.C.L., Hon. LL.D., Vinerian Professor of English Law in the University of Oxford. Macmillan & Co. 1885. *Fortescue on the Governance of England*. Edited by CHARLES PLUMMER, M.A., Fellow of Corpus Christi College, Oxford. Clarendon Press. 1885. *Law and Custom of the Constitution*. Vol. I. *Parliament*. By SIR W. R. ANSON, Bart., D.C.L., Warden of All Souls, Oxford. Clarendon Press. 1886.

of the student of Constitutional Law, still more of the teachers of that engaging branch of legal study, the quotation given above must appear to strike the very keynote of the whole discord. The truth is that before the issue of Professor Dicey's volume there did not exist such a necessary thing as a plain and well-selected statement of the main outlines of the Law of our Constitution "actually existing during the present year of grace," or as it actually existed during any of the years of grace in the reign of her present Majesty. There were of course ample sources of information on the subject within the reach of all persons possessed of enquiring minds and a superfluity of time. The Statutes at large are an inexhaustible quarry in which thousands of workmen might labour for ever without fear of encroaching on one another. Much might be gained no doubt from a careful perusal of the History of Parliament, beginning with the earliest volumes compiled by Cobbett, and continuing down to the present day in the bulky tomes of Hansard. The voluminous library of our Law Reports would come in exceedingly useful with its accounts of reported cases in which points of Constitutional Law have been actually settled or confirmed. The innumerable army of literary lawyers, headed by Sir James Stephen, would throw a certain amount of light on the scene, and the still more numerous host of Constitutional historians would furnish the whole with a highly extensive, if somewhat dim and shadowy, background. The raw material, in fact, existed in abundance, but that was all. It then remained for each student to devise for himself the plan by which he should be guided in his researches, and to arrange it so that the different branches should be properly connected with one another, and yet be kept sufficiently separate to admit of the introduction of a great deal of the History with which the Law seemed almost hopelessly cumbered. At the same time, it was obviously impossible for any student to devise

such a plan until he was thoroughly acquainted with his subject. The natural result of the impossibility of transposing cause and effect was that the neophyte, as a rule, started without any plan at all, began at the beginning of some book which professed to be a Manual of Constitutional Law, read the same through with more or less attention to the end—the attention, no doubt, beginning to flag somewhat in proportion as the end came nearer and nearer and the real work most probably ought to have been just beginning, had the reader only known it—the notes made by the wayside naturally falling in with the lines of the plan adopted by the particular Manual. Whatever the arrangement might be, however—whether purely historical or only historically retrospective, it was almost inevitable that the notes of the neophyte should be mainly historical; that the antiquarian portions of the old Law should occupy more space in his note book and make more impression on his mind, and that in many cases the Law of the present day should be only vaguely referred to and soon forgotten, or in many cases entirely omitted, where the edition of the Manual was not quite brought down to date, and but little effort had been made to supply its deficiencies. The natural result of such a haphazard mode of study is a tendency to attach greater importance to the antiquarian side of the subject, to develop Constitutional Historians, rather than Lawyers.

From the old, more purely Historical groove, Professor Dicey may claim the credit of being almost the first to break entirely loose. Bagehot and Hearn must be regarded as to some extent his forerunners on the new path, but both Bagehot and Hearn “deal and mean to deal mainly with political understandings or conventions and not with rules of law.” It is as the first writer on Constitutional Law who has attempted to deal with strict rules of Law from an exclusively modern standpoint, without any reference

to History, that Professor Dicey will make his mark in literature, and it is this peculiarity which constitutes the value of his work. Truism, in fact, though the opinion quoted at the beginning may appear to be, it is none the less true that it has never been stated so clearly before, and certainly never been acted on so determinedly and intelligently by any professed writer on Constitutional Law.

To fuse Mr. Plummer's edition of Sir John Fortescue's treatise on *The Governance of England*—which is obviously a mass of pure antiquarianism, and is intended to be so—with two works of so essentially modern a scope as those of Professor Dicey and the Warden of All Souls,—to rearrange the result according to fancy, taking care, however, to give the greater prominence to Mr. Plummer, and to squeeze Professor Dicey and the Warden of All Souls into out-of-the-way holes and corners, and then to label the whole, So-and-so's Constitutional Law, or some other equally imposing title, would be very much the process by which many a mixed dish among modern productions delusively styled Constitutional Law books has been produced. It may be hoped that their compilers will take to heart the warning which Professor Dicey is so careful to give to all who shall attempt in the future to write on Constitutional Law. As, however, our scope is not limited to the present year of grace, we are free to include Mr. Plummer's work.

There is much to be said in favour of Mr. Plummer's interesting reprint. It is a monument of research, a model of careful and exhaustive editing. The Introduction, which includes a sketch of the politics of the reigns of Henry VI. and Edward IV., a life of Fortescue, and a statement and criticism of authorities, is neither too long nor too short, excellent in matter and style, neither too much encumbered with footnotes, nor enveloped in too deep mystery for lack of them. The Chronological Table is useful and not too crowded with dates. The notes to the text are as numerous

as could possibly be desired, and in very few cases do they err on the side of undue length. A vast amount of general Constitutional History may be gathered by the perusal of scattered pages throughout the volume, and in dealing with the subject of Taxation (pp. 210—215, 219, 221), and the Navy (pp. 232—238), Mr. Plummer has shewn a considerable faculty for selection and omission, not always present in otherwise able editors. The general get-up of the book, moreover, is excellent, and the type is good, far better than in some of the books produced at the Clarendon Press.

Where praise is due we have given it without stint : we must be allowed by way of criticism to remark that it was scarcely wise for Mr. Plummer to attempt to revive, even indirectly, the old heresy with regard to the change effected by the statute of 1430, which was so decidedly extinguished by the Bishop of Chester. It might conceivably be urged that Henry VI.'s horror of field sports, far from being a proof of a "saintly character," was rather due to the weakness and feebleness of temperament, amounting almost to criminality in one set in authority, and beyond doubt one of the principal causes of that "lack of governance" from which sprang all the disasters of his reign. It might be possible to differ from Mr. Plummer as to the appropriateness of the parallel which is drawn between the total exemption of the French nobles and clergy from taxation and the smaller amount of the sums contributed by the English clergy and nobles in comparison with those paid by the Commons, and to point out that in the early Norman reigns almost the whole of the taxation fell on the nobles, that the clergy were brought next under the fiscal system, and, last of all, the mass of the Commons. The inequality, moreover, between the contributions seems more the result of accident — the process known as "buying privileges from the Crown by gifts of hard cash" — than from any connection with the military

system of the country. The main point, however, on which we must differ radically from Mr. Plummer, is with regard to the *text* of the Treatise itself. If the book had been intended as an *édition de luxe*, or a facsimile reprint, it would have been intelligible that the antique English and eccentric spelling in which Sir John Fortescue's views are, we may briefly say, disguised to all save readers practised in mediæval English orthography, should be retained. But in a book which is presumably intended for ordinary readers as well as for professed antiquaries, and for private as well as public libraries, it would have been wiser to assimilate the text as nearly as possible to the tongue understood of the people. We cannot see the use of asking the ordinary student to lay to heart the "*demeynyng*" which the "*kyng of Scottis*" dreaded "*to be practysed in his land*" (p. 130), a style of writing not very fascinating to anyone but a rarely earnest student of old English, and it is difficult to see what purpose, save bewilderment, is served by retaining the forms *Burgonye*, *Langdoke*, *Fflaunders*, *Ffraunce*, in preference to *Burgundy*, *Languedoc*, *Flanders*, *France*.

The most important part of Fortescue's Treatise is his proposal to strengthen the resources of the Crown, and render it more capable of acting with decision and effect in matters of government, by providing it with a permanent revenue sufficient to serve not only for its ordinary expenses but also for any extraordinary demands within certain limits. The result of this measure would obviously be to render the Crown in no small measure independent of its subjects, and, as Mr. Plummer points out (p. 131), to eliminate the popular element almost entirely. Fortescue in this, no doubt, wrote advisedly. He recognised that the strength of a Government depends entirely on the depth of its purse. He found himself compelled to choose between a strong King who would be but little subject to popular

control, and a weak King who would be unable to enforce peace and order. With the evils of the last years before him as an example of the rule of the latter, he naturally chose the former; all through the Plantagenet reigns, in fact, the grand political difficulty had been to reconcile a strong Executive with the existence of effective popular control. The Tudor Monarchs solved the question in favour of the Executive, very much on the model proposed by Fortescue. The quarrel between the Stuarts and their Parliaments represents an attempt to reassert once more the right of control, at first by Constitutional action, later by force. The wisdom of succeeding generations solved the difficulty, eventually, by transferring the exercise of Government to the Cabinet—a body of Ministers primarily appointed by the Monarch—and rendering it at the same time impossible for him to appoint or retain Ministers who are distasteful to his Parliament, by limiting the supplies strictly to the term of one year in the Appropriation Act. The old jealousy existing between the Executive and the Legislative was naturally removed when once the latter had obtained complete control over the former, nor does Parliament fear to strengthen the hands of the Executive by granting a liberal revenue, when that Executive is practically appointed, or at least retained in office, at its will. Fortescue, in fact, was sufficiently clear-sighted to perceive that the evils of the last Lancastrian reign were intolerable, and he was possessed of sufficient political science to suggest the only remedy possible at the time. It was natural that he should not foresee that the evils of Personal Government might become more intolerable, and the need of a remedy arise once more with equal insistence. Surveyed by the light of subsequent history, his views and his hopes, as embodied in his treatise on *The Governance of England*, appear veined with error and destined to failure, and yet undoubtedly the teaching of preceding events and the experience of his

own life left him no apparent alternative but the scheme which is formulated in his book.

The evolution of the Cabinet system as a mean between the discordant claims of King and Parliament has so effectually satisfied the difficulty it endeavoured to meet, and established such a complete accord between the Monarch and the two Houses that there is no incongruity in describing the union of these three elements as an united, coherent whole, under the name of the King in Parliament, and attempting to define its functions and powers. At the same time, it is necessary to bear well in mind the fact that each member of this union has an individual as well as a collective existence, and that the powers exercised by them in their individual capacity are entirely distinct from those which they exercise in their collective capacity. It is possible, in fact, to undertake the task of explaining the powers and functions of the King in Parliament from the general point of view, or to narrate in more special detail, and in order, the powers and functions of the House of Lords, the powers and functions of the House of Commons, the powers and functions of the Monarch—that is, practically, the Executive. The former constitutes part of the duty undertaken by Professor Dicey; the latter has been partially attempted by the Warden of All Souls. Clear and careful explanation, supported by apt illustration, and eschewing everything in the shape of unnecessary detail is required for the one; for the other, exact tabulation of innumerable dates, statistics, statutes, and statements, and a logical arrangement of the whole into divisions and subdivisions, heads, sub-heads, intelligent care in selection and omission, and a due heed to proportion, so that no one part should be either unwieldy or incomplete in relation to the other parts or to the whole. The subjects and methods of the treatises by Professor Dicey and the Warden of All Souls being so very diverse, it is only to be expected that

the results should differ very considerably in their character. This difference may be easily expressed by a comparison of Indexes. Professor Dicey's Index is a mere bagatelle, hardly necessary at all, a sacrifice, no doubt, on the altar of criticism; that of the Warden of All Souls is a dire reality, a formidable but altogether indispensable institution. Professor Dicey, in a few words, gives to the world a series of brilliant and fascinating Essays, which are nevertheless essentially practical and straightforward in their tone; the Warden of All Souls must be credited with having written a book of reference of a sober cast, though undoubtedlly of a useful and appropriate nature, not the least sobering feature of which to the reader is the lengthy list of *corrigenda* staring us in the face, and the troubled vision of the additions which we could make to it.

The powers and functions of the King in Parliament—or, to use Professor Dicey's phraseology, "Parliament thus defined has under the English Constitution the right to make or unmake any law whatever;" and further "no person or body is recognised by the Law of England as having a right to override or set aside the legislation of Parliament." This definition of Parliamentary sovereignty is the most important of the three propositions which Professor Dicey has laid down as the basis of the Constitutional rights of Englishmen. The "omnipotence of Parliament" is at once the peculiarity and the safeguard of the English Constitution. There is nothing which Parliament cannot in theory do. It can extend its own duration, and has actually done so in the notable instance of the Septennial Act, which was at the outset merely a decree that the sitting Parliament should prolong its existence for four years beyond the term fixed by the Triennial Act. It can commit total or partial political suicide by abdicating the whole of its functions, or destroying one of its branches. It can make that legal which was illegal, or transform legality itself into illegality.

It can render illegitimate children legitimate, make valid a marriage service which was invalid by law, prohibit or allow the cultivation of tobacco in whole or in part, grant complete independence to one set of colonies, partial self-government to a second set, and refuse the right of governing themselves at all to a third. It is obvious, therefore, that under this system there can be no such thing as a grievance felt and resented by the majority of capable citizens, or at least that the span of its existence is limited the moment it is felt. Grievances, of course, may and must exist, but they are grievances of minorities only, whether these be large or small; for when once the majority of capable citizens have become convinced that some existing institution, custom, or law stands in need of amendment, re-creation, or extinction, they have but to set in motion the machinery provided for the purpose by the Constitution in order to signify, with more or less emphasis, to the King in Parliament their desire for such a reform, and after a certain amount of the friction which seems inevitable in the working of all powerful and complicated Constitutional engines, the change will be effected more or less on the lines indicated. Nothing, in fact, is too high or too low for the Parliamentary Sovereign. Nothing can exceed the ease and light-heartedness with which it will sometimes plunge with very little forethought, and hardly any debate, into Legislative acts of incalculable importance to enormous populations, except, perhaps, the extraordinary manner in which it will demur, and delay, and debate over paltry details which affect petty individual interests. Mr. Lowe's proposal to lay a tax on matches certainly excited far more interest and opposition in Parliament than did the Bill which conferred self-government on the large and thriving colony of Victoria, and it is easy to conceive that a measure might be slipped through Parliament almost without debate for conferring knighthood on every

inhabitant of India when an attempt to suppress the intolerable nuisance of the Salvation Army bands would be contested tooth and nail, delayed and opposed in every way that the forms of Parliament and the Constitution would permit, even though it should eventually pass into law. It is true that fear of the result would probably prevent the Parliamentary Sovereign from attempting anything calculated to arouse the wrath of the nation, and that the habits and training of the human beings of which it is composed render it unlikely that they will act except in accordance with their habits and training, but, subject to these limitations, Parliament is practically omnipotent. This omnipotence has undoubtedly considerably and advantageously influenced our history in the past, and will continue to do so in the future. It has permitted a gradual and regular Constitutional development, facilitated the excision of rotten branches and the grafting of sound ones, partially satisfied with hopes for the future existing discontents of minorities, afforded a ready remedy for the stormy passions of majorities—in a word, it has assisted healthy progress, averted revolution, almost expurgated civil war.

It may be a curious subject for enquiry what would happen if the Parliamentary Sovereign should become unable to act, or only able after long and tedious delays, with much ponderous effort and exertion. What if the oil were to dry up on the rusty ironwork, and the clogged wheels refuse altogether to turn round? What if the friction overpowered the action, and the result were to be complete inaction and inertness? That is a question which may perhaps be beyond the scope of a Constitutional lawyer, but is surely one in which every citizen is interested and which seems at the present moment of such vital importance that other questions sink into comparative insignificance beside it. During the last ten years, the House of Commons

has been passing through a season of severe trial owing to the obstructive ingenuity shewn by the Parnellite party. Their policy has been to make use of the forms of the House to produce as much delay as possible in the transaction of public business, to fill up with torrents of irrelevant speech all spare moments of time which might otherwise have been used by the Government to push their Bills on a stage or two, and to do their best to get up "scenes" in the House requiring the intervention and the reprimands of the Speaker, and of course involving a vast waste of time in the process of settlement. Beginning in 1875 with merely the two members for Meath and Cavan, Mr. Parnell and Mr. Biggar, the party gradually grew in numbers and audacity. In 1877 it amounted to seven; the General Election of 1880 added 30 more; and the result of the General Election of 1886 has been to endow Mr. Parnell with a formidable following of 86 faithful partisans, the vast majority of whom may be regarded as merely so many votes and voices completely at the disposal of their astute leader. With the increase of their numbers the party has naturally grown in confidence and daring, and the results have been disastrous both to Parliamentary order and Legislative smoothness and facility. The entire Parnellite party had to be suspended and removed by force from the House before the Crimes Act of 1883 could pass through the Commons. The last session of Parliament has revealed a state of things at once dangerous and disgraceful, dangerous to the independence and dignity of Parliamentary life, disgraceful to the men who on any pretext whatever could be brought to assist in it. Curiously enough, though Sir William Anson has devoted thirty-seven pages to a Historical Introduction, seven more to the discussion of various proposals for securing the representation of minorities, only one of which has ever had any practical application and is now swept entirely away by the Third

Reform Act, and lastly, three pages and a half to the consideration of the House's powers of expulsion, commitment, or fine, he does not even mention the subject of Obstruction. Nor does Sir William give the smallest hint that there may possibly exist in the House of Commons obstacles that perpetually reappear in this part of legislation, which have to be continually dealt with by special powers conferred on the Speaker quite recently for that express purpose, or that there may arise a necessity for conferring far more stringent powers, as the only hope of averting the complete humiliation and degradation of the House of Commons. During the last ten years we have been drifting slowly towards the introduction of the *clôture*, the power of closing the debate as soon as it shall appear that the subject has been sufficiently discussed from the point of view of legitimate criticism, and that further speaking is merely intended for the purpose of causing delay; this drifting has been mainly due to the strenuous action of the Irish party. At first, partly owing to the novelty of the thing itself, partly owing to the smallness of the innovating body, their efforts were received merely with astonishment and disgust, but the necessity for practical action was rapidly apprehended. In 1877 the Speaker was empowered, when a member had been twice declared to be out of order, to put the question to the vote "that he be no longer heard." Three years later it was found necessary to arm the Speaker with the power of procuring the "suspension" of refractory and obstructive members. In 1881 further changes were found to be indispensable, and the Speaker was entrusted with the duty of limiting discussion in cases where "urgency" had been previously declared by the Government. It may be worthy of note, however, that this rule was not agreed to by the House until the whole Parnellite party had been "suspended" for wilful obstruction and contempt of the

Chair, and forcibly removed by the Serjeant-at-arms and his assistants. The next year saw the partial introduction of the *clôture* by the passing of a resolution that when the Speaker considered that it was "the evident sense of the House" that the debate should cease, he should be empowered to declare the same to the House, and call upon the Leader of the Government to put the question to the vote, when, if it should appear that one hundred members were in its favour when less than forty opposed, or two hundred when the minority was over forty, the debate should be brought at once to a close. These four novelties in Parliamentary practice which the necessity of modern times has produced, seem surely to demand a place in a detailed account of Parliamentary practice and privilege, at least as much as a disquisition on the practically obsolete branch of Royal prerogative known as the "Suspending Power," and with far better reason than the speculative theories and projects of Mr. Hare and Mr. Leonard Courtney. The actual, immediate importance of the subject may be measured by the following extract from the recent speech of the present Leader of the House of Commons at Dartford. "Your House of Commons," said Lord Randolph Churchill, "is at the present moment in a state of slavery, of absolute slavery to the caprices of the Radical and Parnellite sections, so far as proceeding with public business is concerned, and of this you may be absolutely certain that there is no chance of legislation of any sort being undertaken with any prospect of success until freedom has been restored to the House of Commons. The first and chief desideratum in any reform of procedure must undoubtedly be a simple and effective power of closing debate. The evils of a *clôture* are very numerous, and some of them are very grave, . . . but they are not to be weighed with the evils which attach to the danger of obstruction in the House of Commons."

It seems probable that in the second edition of Sir William Anson's manual it will be necessary for him to introduce an entirely new section, entitled "Rules of Debate," under which he shall speak of the *clôture*.

If it were desired to find some fault with Professor Dicey's excellent Treatise, it might be observed that perhaps the chapters dealing with the Legislative sovereignty of Parliament are a trifle too long, especially the fourth, which treats of *Parliamentary Sovereignty and Federation*. The question of Federation itself has very little bearing on English Constitutional Law, except as a side-light, or perhaps in view of the Home Rule controversy; and, therefore, though exceedingly apt and useful as an illustration of the distinction between Legislative bodies which are and those which are not Sovereign, the portion of his work dealing with it should have been restrained within narrower limits.

Having disposed of the Legislative Sovereignty of Parliament, Professor Dicey proceeds to explain what he describes, not perhaps very happily, as the Rule of Law, which can be reduced to the form of a proposition in the following terms:—"No man may be punished under the British Constitution except for breach of the law: all men are tried for their offences under the same law; the British Constitution is itself the result of the judicial establishment of individual rights." In dealing with this branch of his subject Professor Dicey is undoubtedly at his best, and in no one instance does he seem to have been betrayed into undue exuberance of language by the wealth of material at his command; and yet his proposition embraces an infinite variety of subjects, all of which constitute far-reaching and important branches of Constitutional Law. The relations of soldiers to their superior officers, and to the private citizen, the equality before the law of the tax-collector and tax-payer, the rights of public meeting, speaking, and printing are treated in rapid succession, but as illustrations, merely, of the general

rule, not as departments of Law requiring elaboration of detail. The latter would be the appropriate task of Sir William Anson: the former is exactly what is demanded from Professor Dicey.

Mr. T. P. O'Connor, in his account of the Parnell movement, records the fact that a young and ardent Irish member, on his entrance into Parliament, enquired of Mr. Parnell what was the best mode of learning the rules of the House of Commons. "By breaking them," replied that great man, who certainly cannot be accused of omitting to follow out the doctrine he preached. The same process may be justly recommended as an infallible mode of discovering anything which is uncertain in English Law, Constitutional or otherwise, and, by a somewhat similar method, according to Professor Dicey, the rules of the British Constitution have become formulated in words and reduced to writing, so far, that is, as they have been formulated and reduced to writing at all. There are, of course, numbers of statutes laying down general statements of law accompanied by innumerable details, which, moreover, in many cases have effected important changes in the previous law. But they are mere refinements of modern times, excrescences on the original simplicity of those leading principles which, for the sake of convenience, may be here described as the fundamental laws of the Constitution. The latter consist, in fact, in judgments or declarations against certain persons who have or are supposed to have broken the unwritten law. They may take the form of judicial decisions against individual citizens, or of remedial statutes, but in every case the rule which is laid down is the result, not of a wish to explain clearly to the citizens at large what they *can* and may do, but to declare decidedly to some offending individual or individuals what they *cannot* and may not do in the future, and the punishment incurred by disobedience. This is the chief peculiarity

which differentiates the British Constitution from most of the written Constitutions of modern times; of which we may take the Belgian as a type. The latter consists principally of authoritative affirmative declarations of the rights of the citizens—of what they may do—such as the right of public speaking, the freedom of the press, the right of holding public meetings and marching in procession. The former would consist much more of negative statements or what must not be done—as, for instance, that it is not permitted to any citizen to create an obstruction, or a nuisance, or a riot in the public streets, and leaving him to infer that he can walk by himself or in procession in the public streets, if he likes, provided he refrains from obstruction, riot, or nuisance: or, again, that it is not permitted to any citizen to print anything that is libellous, seditious, or indecent, with the natural implication that subject to these restrictions he can print or publish what he pleases. The point, in fact, which strikes an English lawyer in dealing with the Law of the Constitution is that there is a remedy at Common Law for the protection of persons aggrieved by any attempts to unlawfully hinder or prevent them from walking, marching in procession, printing, or public speaking, while the Belgian lawyer would naturally be more attracted to the clauses in the Constitution guaranteeing these rights to every citizen.

Nor is this merely a formal difference. Rights dependent on a written Constitution may be suspended *in toto*: many written Constitutions have contained express provisions for this under certain circumstances, and the substitution of a *régime* strongly resembling a military dictatorship, accompanied by martial law. Under the English system, however, the suspension of the Constitution is impossible; it would amount to a revolution of unheard of dimensions. Individual rights might possibly be put in abeyance, as for instance, by

a suspension of the Habeas Corpus Act, but the powers which that perhaps overrated measure conferred on the Government were comparatively slight, and its suspension could never prevent Englishmen from enjoying many of the rights of citizens.

It is this negative character of the British Constitution which forms the chief difficulty in attempting to explain it. It really "does not exist" in any precise and written form, though it would be rash to suppose that De Tocqueville intended to express that meaning. It cannot be found in its entirety anywhere; it has to be gathered piecemeal from, all sorts of different places. In this difficult task, Professor Dicey's work is a valuable guide. It gives a sketch of the whole, tells us a little about the parts, and suggests how we may fill in the gaps for ourselves. It would be difficult to find a more useful and interesting collection of Lectures.

BRITIFFE SKOTTOWE.

III.—A RECENT CASE IN CONSTITUTIONAL LAW, U.S.A.

THE case to which we desire here to draw the attention of our readers strikes us as important from several points of view. It appears to us to illustrate some of the difficulties which are apt, on both sides of the Atlantic, to attend the passing of what is called Temperance Legislation. In this respect, it seemed desirable that the case should be printed by us in the same number with our notice of the Temperance Conference at Prince's Hall, convened by the Social Science Association. It also illustrates certain points of value to the student of Constitutional Law and History in regard to the Constitution of the United States,

as to the relations, under the Federal Constitution, between the Legislature and the Judicature, the jurisdiction of the Federal Courts in the matter of enjoining State Courts, the interpretation of State Legislation in the matter of Registration and Election, and the operation of a Local Option Law in regard to the question of the alleged disqualification of voters in other sections of a county than those in which the Law is in force. Some of the points taken certainly seem to be subtle, and are all the more valuable for the purposes of the student. The judgment delivered in the U.S. Circuit Court by McCay, J., in *Weil, et al., v. Calhoun, Ordinary, and Atlanta Brewing Co.*, deserves the careful perusal of all who are interested in the varied questions connected with Federal and State Law, which came up for the consideration of the Court.

SIMON WEIL, TRUSTEE ; PAUL JONES, AND COX, HILL AND THOMPSON *vs.* WM. LOWNDES CALHOUN, AS ORDINARY, AND THE ATLANTA CITY BREWING COMPANY.

U.S. CIRCUIT COURT, NORTHERN DISTRICT OF GEORGIA,
DEC. 16TH, 1885.

[*Georgia Law Reporter, Atlanta, Ga.* 1886. I. 171.]

**Election and Registration Law : Local Option Law, Georgia.
Constitutional Law.**

BILL FOR INJUNCTION, ETC.

1. The fact that one of several parties plaintiff is a citizen and resident in another State does not give this Court jurisdiction of a bill filed against a citizen and resident of Georgia.
2. A charge in a bill that a certain act of the Legislature of Georgia was about to be declared of force, by reason of a popular vote of the county of Fulton, in pursuance of the statute, which statute prohibited the sale of intoxicating liquors in the counties adopting it, and that some of the plaintiffs were large liquor dealers, and

dealers in foreign wines and wines of other States, and had large stocks on hand, and had license and good will, which in the liquor business is of large value, and that another plaintiff was interested in a chartered brewery, authorized by its charter to make and sell beer, and that the putting and declaring such law of force would materially damage their business, impair thus the contract in the brewery charter, and interfere with their right to sell liquors in the adjoining States, and charging also that the Act of the Legislature, whilst it prohibited, if sustained by a popular vote, the sale of spirituous liquors generally, yet contained a proviso exempting domestic wines from the operation of the Act—present [s] a Federal question, under the Act of Congress of 1875, and the Circuit Court of the United States has jurisdiction to hear and determine such Federal questions.

The Act of Congress, section 721 of the Revised Statutes, prohibiting the Courts of the United States from granting injunctions to stay proceedings in any court of a State, etc., does not cover the case of a bill filed praying an injunction against the Ordinary of a county, who, in addition to his ordinary duties as a probate judge, is clothed by a special statute with the duty of counting the votes and examining the returns of a county election on a Local Option Law, and declaring the result.

The Act of the Legislature of Georgia, known as the Local Option Law, exempts from its provisions domestic wines, though it prohibits the sale of spirituous liquors, including wines.

Held : That it is not competent for a Legislature of a State thus to discriminate between wines made in Georgia and the wines of other States and foreign wines.

Whether this clause—this discrimination—makes the whole act void, the Court does not expressly decide, but

inclines to the opinion that the proviso making the exemption is void, and the whole Act good.

It is competent for the Legislature of Georgia to pass a law to take effect only on the happening of a certain event ; and an act prohibiting the sale of spirituous liquors in the State, excepting certain counties from the operation of the Act, and providing that the law should only go into effect in any county after the people, by a popular vote, had so decided, is within the Legislative discretion, and is not conferring the powers of the Legislature to the people of the counties.

At an election in Atlanta, Georgia, it was evident that there was not sufficient polling places in two of the militia districts composing the city of Atlanta, for the people to vote at a certain election, and the managers and the Ordinary, and other county officers, on the advice of many citizens of both parties, adopted a scheme to facilitate the voting, by having at each polling place three boxes, some 10 or 20 feet apart, and so related to each other as that one manager stood at each box and gave that his special attention, though all joined in the settlement of any questions made, and all were in sight and within a few feet of each box.

Held : That whilst it was very doubtful if this proceeding was legal, yet it did not make the election void, unless it were also made to appear that the result would have been different had no such irregularity existed.

Election managers and persons clothed by law with the duty of receiving the returns of an election, counting and canvassing the votes, and declaring the result, especially with specific power to hear and determine all questions arising, will not be interfered with by an injunction in the performance of their duties.

In this case the plaintiffs have a complete and adequate remedy at law, by contest before the Ordinary, or, if

not satisfied with the result of such a contest, then by a contest before the Superior Court, as provided by the Local Option Law.

The Local Option Law does not disqualify those sections of the counties having local laws prohibiting the sale of liquor from voting in a county election to determine if the Local Option Law shall go into operation in the county in which such localities are situated.

A Registration Law directing the books to be closed ten days before the election, and making no provision for the registration or voting of persons becoming qualified to vote after the closing of the books, and before the election, is not void, so as to render the election void, especially if it do not appear that the result would have been different if a provision had been made for such voters.

When a bill was filed by various liquor dealers charging that their property and contracts and vested rights were about to be seriously damaged by the going into operation of a Law to prohibit the sale of liquor :

Held : That such Act, so affecting private rights, was under the police power of the State.

Held, further : That as the injury claimed was one common to the larger portion of the community, that one or more of a special class could not file a bill to redress the wrong. The bill must be in the name of the Attorney-General, who will make the complainants parties, and sue in the name of the State.

Injunction refused.

H. K. McCay, J.—This bill is filed by three parties :

1. Mr. Weil, as trustee for certain persons holding stock in the brewery, which persons are citizens of the State of Tennessee.

2. Paul Jones, a dealer, among other things, in foreign wines and liquors.

3. By Cox, Hill & Thompson, dealers in wines made in other States, and in spirituous liquors generally, by wholesale.

The bill sets out that at the last Legislature of Georgia, a bill was passed providing for the prohibition of the sale of spirituous liquors, in the various counties of the State, in which there were not already prohibitory laws. The Act provides that it shall only take effect in counties where the people, by a popular vote, shall so determine. The bill sets out that an election under the law has lately been held in Fulton county. That the prohibition vote was the largest by — majority, and that the Ordinary is about to and threatens to declare the result.

The object and prayer of the bill is to seek the intervention of a Court of Equity, to enjoin the Ordinary from so doing, and to ask that, until a final hearing can be had, the Chancellor shall grant a temporary injunction, to restrain him. The jurisdiction of the Circuit Court of the United States is invoked.

1. On the ground that some of the parties are citizens of the State of Tennessee, and they charge that they appear as stockholders, and not in the name of the corporation, which is a Georgia corporation, because the corporation refuses to act, and they make it a party defendant to the bill.

That Cox, Hill & Thompson are dealers in wines made in other States, and that Paul Jones is a dealer in foreign wines and other liquors, and each have, and had, at the date of the Act, large stocks on hand.

Besides this allegation, of the citizenship of these Tennessee people, the bill alleges, as another ground for appeal to a Federal tribunal, that the Act providing for the election is in several respects in violation of the Constitution of the United States. That it destroys their vested rights, in that it impairs the obligation of the contract, in the Charter of the Brewery Company. That it attempts

to regulate commerce between the State and foreign States, and that it discriminates between domestic wines and those of other States, and the wines imported from abroad, by prohibiting the sale of these two latter wines, whilst it expressly exempts domestic wines from the operation of the Act. This latter, as I understand it, is the principal ground on which the plaintiffs insist there is a Federal question involved, and that this Court has, therefore, jurisdiction of the controversy. The bill alleges that the necessary and inevitable effect of the law, if it be declared of force, will be to make wholly worthless the stock, fixtures, etc., of the Brewery, and seriously to interfere with the property, business and vested interests of the complainants.

The bill charges, that the law was not published as the Code requires; that the registration was ordered before the election was proclaimed; that the Registration Act made no provision for the registry of persons who, though not entitled to vote when the books were closed, yet became so during the ten days intervening after the closing of the books and the registration; that persons living in the corporate town of West End were permitted to register and vote, and persons residing in various other localities in the county were so allowed, and that in West End and other localities prohibition was already established, and by the statute no election could be held in such localities; that one or two registrars were not freeholders, as the statute requires; and that at the two voting precincts in Atlanta, on the idea that there was not sufficient opportunity for all the voters to cast their ballots during the legal hours, three separate boxes and voting lists had been placed at each poll, the voters required to come up and vote according to a plan based on the first letters of their surnames, and that under the plan only one manager could properly and practically preside at one box, they being at least ten feet apart.

Various affidavits have been filed, to wit : Ordinary Calhoun's, denying that he had fixed any day for declaring the result ; denying the alleged defect in the advertisement of the election ; insisting that all the registrars were freeholders ; and asserting that he had expressed no opinion as to how he would decide the questions made on the returns, and that he had notified both parties that he was ready to hear any objections and arguments upon them. And as to the illegal boxes, saying that the boxes at the two city precincts were resorted to at the request of a meeting of citizens of both parties, and were intended to facilitate the casting of the ballots and did in fact do so, in a very decided degree, and that the three managers were so situated as that they all might, and generally did, inspect and pass upon any question that arose within the sphere of their duties.

Affidavits were filed by the plaintiffs, qualifying the statements of the Ordinary, as to what he said about when he would declare the result, and as to what he would do, but not materially denying his statements on the subject.

Also an affidavit explaining their motives for charging that two of the registrars were not freeholders ; also, Spalding's and Flesch's and other affidavits of managers and others attacking the arrangements at the polls, and stating that it was not possible, under those arrangements, for each of the managers to supervise and pass upon each voter.

The defendant insists that the bill makes no case justifying the granting of the prayer, because :

No such parties or questions are made as to authorize the interference of a Federal Court under the Constitution and laws of the United States.

That the registration, as provided by law, and as actually carried out, was no infringement of any rights of any one, and that whatever objections there might be to the arrange-

ments at the polls, as to the boxes, mode of voting, etc., and the capacity of the managers to oversee the voting, the election is still not illegal, but is good, unless it is made affirmatively to appear that had these irregularities not existed, the result would have been different.

That the clause in the Act as to localities where prohibition already existed by law, did not render the voters in the locality referred to disqualified voters, in the county elections.

That under the police power of the States, it was competent for the Legislature to pass the law objected to, notwithstanding it may affect the property of the complainants, as insisted on in the bill.

That it was competent for the Legislature to pass the law, and make its going into effect in any county dependent on a popular vote.

That however the clause exempting domestic wines from the operation of the Act might be unconstitutional and void, yet it was possible, this being a mere proviso or exception to a general clause covering all wines, to reject the proviso, and leave the general clause stand.

The defendant was a State Court, and the Act of Congress, section 720, of Revised Statutes, prohibited a United States Judge granting an injunction to restrain a Court of any State.

That if not a Court, the Ordinary is still an officer, clothed by the laws with certain duties requiring judgment and discretion, and is for that reason exempt from the writ of injunction from any Court.

In view of the importance of this case, the interests involved, and the intense feeling existing in the questions made, I have allowed the most extended and elaborate discussion of this matter. Nearly four days, of five hours each, have been devoted to the argument, and I have given it the very best consideration I am able to do.

Though a public question, I have taken no part in the contest before the people, did not vote at the election, and have much regretted, and as a private citizen, disapproved of many of the methods pursued by both parties in the contest before the people.

There is no more delicate duty a Court is ever called upon to perform than to interfere with the Legislative Department of the Government. Each is a constituent element of the body politic. Each has its prescribed duties, and each is independent of the other in the performance of those duties.

From the very nature of the case, however, it often happens, that the Judiciary branch is called to pass upon the legality and constitutionality of the acts of the other departments. Not that it is, in any sense, superior to them or a supervisor of them. Not that it is, as is sometimes said, the expounder of the Constitution, and, therefore, paramount, in such matters, over the other branches.

The source, and the sole source of the right of the Judiciary thus to interfere, is entirely collateral and incidental, and grows out of the necessities of the case, to wit: the obligation always resting on a Court to choose and decide between conflicting laws.

When private rights are before a Court—any Court—for adjudication, and two conflicting laws are appealed to, the Court must, from the very necessities of the case, decide which of those laws is to be obeyed and enforced by it. If one of them is the Constitution, and the other an Act of the Legislature, and they are in conflict, the Court must choose between them, and obey and enforce the one which by the nature of the Government is of the highest dignity, to wit: the Constitution, the will of the people, expressed in the form of the fundamental law, to which all departments are bound to conform, and in conflict with which, no act, even of the Legislature, is of any validity.

As I have said, every Court, even the humblest, even a Magistrate's Court, called upon to decide private rights, is driven, by the most imperious necessity, to decide the laws controlling the controversies coming before it, and in case of two laws being in conflict, it must, under its oath of office, obey and enforce the highest. This duty, as I have said, is not direct, but collateral and incidental, and forced upon the Judiciary department, by the necessity of the case, to wit: the presence and the pressure upon it of two conflicting laws.

The result is, that to determine the question before it, a grave duty sometimes presents itself to every Court, of declaring even Acts of the Legislature in conflict with the Constitution, and consequently void and of no effect.

This, as is apparent, from a moment's consideration, is a most delicate duty—one only to be undertaken when absolutely necessary. When driven to exercise it, a Court is always cautious and hesitating. All presumptions are in favour of the validity of the Legislative Act; all doubts are to be resolved in support of it, and only in clear and decided cases, calling imperatively for it, should a Court undertake to declare an Act of the Legislature void. The duty is a burdensome and ungracious one, and the matter is to be considered with care and cautiousness and to be decided only after the most serious deliberation, the Court always keeping in sight the source of its power, to wit: the necessity to adjudicate private rights, and always remembering that the Legislature is an independent and co-ordinate branch of the Government, and not a subordinate or inferior one.

I have made these remarks, because, I fear, the subject is misunderstood; men and sometimes Courts talk flippantly and lightly upon it, or assume too much or too little for the Judiciary.

I have myself the greatest respect for the Legislature,

not only because it is my duty, but, because, in the course of a long life, I have generally found it right. Composed, as these bodies are, of many persons, taking time for deliberation and discussion, and acting, as a matter of course, with a full sense of their paramount obligations to the Constitutions of the State and the United States, I have usually found them right and to have kept within their Constitutional sphere.

I repeat what I have said, that the Judiciary has no direct power to control the action of the law-making power. Its jurisdiction arises incidentally and collaterally, and only when it is called upon to pass upon some private controversy, or private right, and one of the parties relies upon some law, which the other insists is unconstitutional. In such a case the Judiciary must obey and enforce the higher law, to wit: the Constitution.

The first question I am to decide, is that of the jurisdiction of this Court, and whether it is prohibited, in cases like this from acting at all by Sec. 720 of the Rev. Stat.

Whatever may be the status of this case, on the subject of jurisdiction, by reason of the residence of some of the parties in Tennessee, (though I doubt if the fact of one of them, or one set of them, residing in another State is sufficient), yet it is certainly true that the charges in the bill do make a Federal question. Since the whole gravamen of the case is the charge that the complainants are about to be deprived of important property rights, by the attempts of the defendant to declare in operation a pretended law, which is charged to be in violation of the Constitution of the United States, in two or three of the provisions of that Constitution.

Under the Act of 1875, the Circuit Courts are, in express terms, declared to have jurisdiction in all cases over five hundred dollars, where a right is claimed under the Constitution and Laws of the United States.

It is said, that under Sec. 720 of the Rev. Stat. this Court cannot grant the prayer of this bill, because the Ordinary is a State Court, and that Section prohibits any Federal Court from enjoining a Court of any of the States, under any circumstances. I do not think the Ordinary in the performance of the duties provided by this Act of 1885, of the Georgia Legislature, is a Court, in the sense of that Section.

The universal practice of the States is to have some branch of the Executive Department to determine the results of an election. Indeed, all officers performing such duties, are part of the Executive Department, and yet in all the States the rule is imperative that the Executive and Judicial Departments should be kept distinct. Whether officers of this kind are not exempt from the process of injunction, on the ground, that though not Courts or Judicial officers, yet because they have duties to perform, requiring discretion and judgment, the Courts by injunction will not interfere with that performance, is another question, which I will discuss further on in this opinion. Having, as I think, for this reason, jurisdiction of this case, I proceed to decide the questions made and argued so ably and exhaustively before me.

I am inclined to the opinion, that the fact the Registration Law makes no provision for the registration of those who became competent to vote after the registration is closed and before the election, does not vitiate the registration. If the period between the registration and election be brief, and only such as is proper for making out and putting in proper shape the registration papers, it seems to me that both reason and authority sanction such registration laws. The authorities are in conflict, but in my judgment, sound sense and a due regard to the true interest of the State should lead a Court to sustain such laws as are but a prelude and preparation for the election; and a part of its

machinery, even though some days intervene between the close of the registration and the actual opening of the polls. It is self-evident that some time must be taken for making out the returns of the registration and putting them in shape for use at the polls, and whether this shall be one hour, or one, two or ten days, would seem to depend on the Legislative will, and if not grossly excessive, ought to be sustained.

Besides, it seems to me that such objections to the registration ought, for reasons of public policy, to conform to the rules applicable to objections to elections not held in strict conformity to Law, to wit : It should be made affirmatively to appear that the result would have been different had the illegality not existed. Perhaps the voter might have private redress for the wrong done him in refusing his vote, but that is a very different thing from making an election void on a mere abstraction not affecting the result.

It seems to me clear that it was not the intent of the Local Option Act to deprive voters who resided in localities within a county, where prohibition has been provided for by a special enactment, of the right to vote in a county election under this statute. Laws are to have a reasonable interpretation, the whole Act is to be taken together and its scope and intent considered in coming to a proper conclusion upon its meaning. This law evidently in its passage through the Legislature originally contemplated that this local option might be submitted to cities, towns, and other localities, perhaps militia districts. It was amended by confining its operation to counties, and the language on which much stress is laid, "cities and localities," was left in the bill, with the idea that though a county might vote wet, as they call it, the local laws should not be affected by such vote. There is no reason why those localities, where the sale of liquor is prohibited by some local law of

limited range, should be deprived of the right to take part in deciding what shall be the policy of the county on this subject, in which they have precisely the same interest as other citizens of the county.

The great complaint of this bill is that by this law the complainants are deprived of their property, and injured in their business, etc., etc.

Nothing is better settled, by a large number of decisions of the Supreme Court of the United States, than that such losses and such damages are not a good objection to a law. The States must have power to legislate for purposes of good order, the preservation of the public health, and a thousand other subjects, and it is an every day event, that some man's property is made less valuable, perhaps worthless, by the operation of laws passed by the Legislature for the public good. Professions in which men make money, and devote their whole time, are declared illegal and are broken up and destroyed, very much to the hurt and pecuniary loss of the persons concerned, and they have no redress. I allude now to the profession of the gambler. So, too, so vastly profitable a business as a lottery, even though protected by a Legislative grant, has been broken up by a law prohibiting its exercise, and its property and business dissipated to the winds, without any remedy. So, of the oleomargarine manufactory, and so of a hundred different investments, made under laws not prohibiting them, yet rendered valueless or far less valuable by means of the operation of laws passed by the Legislature for the public good, as it supposed.

This whole subject of the liquor traffic, and investments, precisely like those of the complainants, broken up, or largely crippled, by prohibitory laws, has been a fruitful source of discussion before the Courts, and they are all now agreed that such rights and properties as the complainants assert they are about to have injured or destroyed,

if this law be declared of force, are not protected by the Constitution of the United States (7, Howard 504, 97 U.S., 25, 16, Wallace 129; 11 Otto, 814). This question has been before the Supreme Court of the United States—the Court of the last resort—in cases of this kind, and that Court uniformly and clearly held, that rights of the character here set up must yield, however costly and devastating may be the evil, to the will of the Legislature, in its passage of laws, in their judgment for the public good. It is one of the risks that every man takes, in entering a business or making an investment, and he cannot complain.

That it was competent for the Legislature to pass this law, and make it operative in any county accordingly as the people might vote, is now so well settled, as not to admit of serious discussion. My own views are stated in the *Brunswick City case*, in 54 Geo. Reports.

I do not doubt but that there is one of the provisions of this bill in violation of the Constitution of the United States, to wit : that provision, which whilst it provides for the prohibition of the sale of all intoxicating liquors of every kind, exempts, by a provision in another section, domestic wines from the operation of the Act. This it was not competent for the Legislature to do.

Commerce between the States is, by the Constitution of the United States, under the control of Congress, and citizens of each State have all the rights of citizens in other States.

I am not at all clear that this discrimination in favour of domestic wines does not render null and void this whole bill.

It is true there are many cases where an unconstitutional clause has been decided not to affect the other portions of the Act, if such clause be independent, and capable of being stricken from the Act without affecting the general scope of the Law (12 Otto 123; 2 Gray 88-89).

I do not think, however, the test insisted upon by the complainants is the proper one. The Texas case decided by the Supreme Court had precisely the objection to the law that is made here, and the Supreme Court held that the discrimination was unconstitutional, but they declared that the void clause did not affect the rest of the Act.

So, too, in Georgia, our Court held, in deciding upon the Act to regulate the practice in the Supreme Court, that the clause directing certain classes of cases to be continued until the next term of the Court was void, as in conflict with the Constitution of the State, which prohibited continuances in the Supreme Court, except for Providential causes. Yet that Court did not intimate that the rest of the Act was void, and as every lawyer knows, that Act has ever since, except this obnoxious clause, been the principal Act enforced by the Court for regulating the practice. Now if the test is, as contended for by Mr. Glenn and Hawkins and Cox—that if we may fairly express doubt if the Act would have been passed or the people have voted for it at the election with this obnoxious clause out, then the whole Act is void. If this be the test—why does it not make void the whole Act in the Texas case? and the Act passed upon by our Court in Georgia? May we not say, that it is possible the Texas Act would not have passed the Legislature with the obnoxious clause left out? Who shall say that the Georgia Legislature would have passed the Act regulating the practice in the Supreme Court, had the clause providing for continuances of certain cases to the next term been left out? The test suggested is inconsistent with these cases, and cannot be the true test. You cannot imagine what the Legislature might or might not do. The proper test is to examine the law as it passed. See to its scope, and general object, and then inquire if the scope, aim and general design of the Act may or may not still be enforced with the obnoxious clause left out. Is the

language so broad, as that the bad provision cannot be pruned away, leaving the tree still unhurt, and still spreading its essential branches over the land it is designed to shade? This Act is entitled an Act to "prohibit the sale of spirituous liquors;" the general clause makes it illegal to sell *any* intoxicating liquors, no matter where made, if the people vote that way, to wit: dry—dry it is, not even Champagne or Monopole, not even Longworth or Cincinnati, or the wine grown on the Pacific, or the Georgia wine from the mountains, or the midlands, or in the rich south-west — by this section they are all put under the ban. The proviso is a separate section; an excrescence on the bill; contrary to its whole scope, and making the whole bill almost a farce. What would prohibition be worth with a domestic wine shop on every corner?

The proviso exempting domestic wines ought never to have been in the bill, if its avowed purpose was ever to be carried out. A man is just as drunk, just as much a brute, just as much a worthless excrescence, who is drunk on domestic wines, as though he got drunk on brandy or champagne.

It is possible, as I think, to separate this obnoxious clause, protecting domestic wines from the operation of the Act, from the rest of it—declare it void, and let the broad prohibition clause have its full effect.

I am not, however, as clear on this branch of the subject as I would like to be; the subject is a new one, the authorities rare, and one fears to trust his own judgment in coming to positive conclusions, with so little to guide him.

I only say this, that I am inclined to hold as I before have indicated.

The arrangement of the boxes at the polls, in the two city precincts, was unusual, and of very doubtful legality. Indeed, I am compelled to say, that I do not think it was legal, and could have been made, in the peculiar consti-

tution of our voting population, a tremendous engine for fraud. But it was adopted at the request of leading men of both parties, and was to meet a difficulty that presented itself to every man. How were 4,000 people to vote? Anybody who knows anything of elections could see at a glance that, whatever might be calculated to be done in a minute, many people, with all the accidents, incidents, and delays, inevitable on such occasions, *could not* vote in the time allowed by law.

By the arrangement to which objection is made, it appears that, in fact, about 4,000 did vote, a most extraordinary and unprecedented result.

It appears by the affidavits that great order was preserved, and it does not appear that a single voter was seriously delayed or hindered in casting his ballot. True, it is plain to me that the managers could not under the circumstances fully perform their duty, to wit : to see and judge in the manner usually practised, of the propriety of receiving each vote, and I am not prepared to assert that this arrangement was legal or ought to be repeated. It is to be hoped that the proper authorities will see to it that this gross scandal be prevented in the future ; all experience indicates that not more than one thousand voters ought to be required to vote at one polling place, and any state of things which requires more is an interference with the freedom of the ballot that ought not to be tolerated for a day.

As I have said, I do not consider this arrangement of the ballot boxes to have been legal. But I do not think that illegality affects the election, unless it were made to appear that the result would have been different if no such illegality had occurred. Such is the settled rule—such is the Code of Georgia.

If the election be held at the proper time and place and by the proper officers, the election must stand unless it is

made to appear that the result would have been otherwise, had the thing complained of not existed. Here the complaint [is] that such arrangements were made as that the managers could not do their full duty, that is all, the proper men were there, but they mismanaged the matter. (Code of Georgia.)

The Ordinary, though not a Court, in its technical sense, is yet an officer clothed by Law with certain functions of examination, decision, and discretion.

Now it is admitted that a purely ministerial officer may be enjoined. But I do not think a single case has been read or can be found, where an officer or body has such duties as are cast on the Ordinary, under this law he has been enjoined. He is to count the votes and declare the result and to *decide all* questions that may arise. The cases decided by the Supreme Court of the United States, of the Registrar of the Land Office, the Commissioner of Pensions, Secretary of the Navy and like cases are not nearly so strong as this. (21 Howard 479, 7 Wall.—9 Wall. 575 ; 14 Peters 497. 7th Howard, case of Public Printer. See Cooley, Con. Lim., 5th Ed., 782.)

The Writ of Injunction is an extraordinary writ, and there are many limitations to its exercise.

It will not issue to restrain the enforcement of a purely Criminal law. It will not issue to restrain an officer or body whose duty it is to exercise his judgment or discretion. Above all, it is a writ which is only appealed to as a last resort ; the party applying must shew that he has no adequate remedy at Law. Equity only comes in when the Law by its defective and old fashioned stiff methods of procedure fails, and it is an everyday act of all our Courts to decide, that though the complainant has been grievously wronged, and has the most important interests endangered, yet by reason of the settled rules, limiting the granting of injunctions, they will not interfere.

One of these rules is, plaintiff must shew that his rights are in danger ; there must be no guess work, or hearsay : he must state facts, capable of legal proof, on which to base his case.

What is the case here ? How do the complainants know what was the result of the election, or how the Ordinary will decide ? He denies by his affidavit that he has told them, and their affidavits do not really controvert his. The returns of the election were turned over to the Ordinary. They may be and probably are yet sealed up ; their contents can only be known by rumour, or newspaper report. True, the bill states that the majority at the election was for prohibition. But it is impossible anybody shall know it except from rumour and report, and the charge in the bill must necessarily have that limitation. It may be, it probably is, true, but that is not sufficient. Hearsay rumour is not enough. Even an oath of a fact to the best of the complainant's knowledge and belief is not sufficient. The results of granting an injunction are often so tremendous that the strictest rules have been adopted, based on long experience, and requiring certainty and definiteness in the allegations, so that the Court may rest satisfied that it is not striking in the dark, but is dealing with stern facts, capable of proof, and that by legal evidence and not by hearsay, or the report or statements of anybody. The complainants say prohibition has carried. How can they know this only from rumour, and hearsay ? They do not produce nor have they probably seen the returns of the managers. The law places them in the custody of the Ordinary. An outsider cannot even inspect them at will.

The results of an election can never be known so as to justify an injunction, on the ground that a pretended result has taken place, until the vote has been counted by the persons appointed by law to open, count and declare the

result. Until then the result is mere rumour. It may be correct, it may not.

Who knows what the Ordinary may do? Who knows that he may not hold that West End and other parts of the County, to which they refer in their bill as having no right to vote, had in fact no right, and refuse to count any such vote? If they are right, if that is the law, and these localities had no right to vote, surely the presumption is the Ordinary will so hold and so declare. What American who lived at the time Mr. Hayes was declared by Congress to have been elected President, can fail to appreciate the pertinency of this view of the subject? Who was the President? The newspapers differed, this man said this and that man that. Even Congress was driven to the extraordinary course of selecting a Commission, and though a legal result was finally reached, thousands of men still think and assert that Tilden was elected. Who does not remember the doubts and uncertainties of the result of the vote for President in the State of New York at the last election? For more than a week the scales hung trembling in the balance, sometimes striking the beam on one side, and again on the other, as new developments and corrections of returns were announced. How the newspapers and other politicians differed, one side asserting, with the strongest protestations that they were successful, and the other with just as much positiveness directly the contrary. At last the persons appointed by law to count the vote performed their duty, and Mr. Cleveland became President by reason of having received only about 1,200 more votes in the State of New York than Mr. Blaine.

The gravest doubts existed as to the result, the most tremendous consequences depended upon it—the Presidency of the United States—the exercise of the Executive franchise of the nation—the possession of the patronage and the control of the whole machinery of the Government

of fifty millions of people hung in uncertainty and depended upon the counting and canvassing of the returns of the counties of the State of New York. The canvassers for that purpose met—performed their duty, and though the result depended upon how five or six hundred persons had voted—fifty millions of people quietly acquiesced in the result, and not a question has been raised as to its legality. A consequence, not only strikingly illustrating this point, but also exhibiting, in strong colours, the capacity of our people for self-government and how this mighty democracy of free voters can quickly settle, through the properly constituted channels, disputes, which in the Governments of the Old World would almost inevitably lead to anarchy and civil war.

I am asked to consider counted these votes, to treat the result as ascertained, and for that reason, enjoin the Ordinary from counting and ascertaining it.

The plaintiffs are in no danger of any of the evils they fear, unless the result be against them, and a statement to that effect is a *sine quâ non* to their case. To get at this knowledge the votes must have been counted, and yet the object of the bill is to prevent a count. To make out their case it must appear that the result of the election is so and so, and yet their bill is filed to prevent and stop the very thing they assert.

The counting and declaring of 7,000 votes is not by any means a mere formal and ministerial matter. There are always faulty votes, sometimes votes which ought not to be counted—sometimes there are votes about the propriety of counting [which] there is great doubt. Under our law, especially, the canvasser is invested with very important duties. He may examine the list of voters, investigate [the] legality of each vote, and if he be satisfied of its illegality he may refuse to count it. He may look into the local managers' returns—all experiences shews that they are often seriously defective, sometimes they are not even

signed—sometimes they are so grossly informal as to leave even the most liberal mind in doubt as to what ought to be done with them. It is the practice in some States, notably in New York, to return them to the local managers for correction, all this has to be examined into by the canvasser. We have in the history of the State of Maine a striking instance of the wide range open to the judgment of the canvassers. By a system of technical objections the canvassers in that State actually changed the result of the election; not perhaps fraudulently, but by the application of close critical rules, as to the spelling, etc., they disposed of votes enough to change the result, casting out perhaps over one thousand votes. Anybody familiar with Election returns will understand this. They are made out in a hurry, late in the night, often by quite uneducated men, and men grossly unfamiliar with figures, and the very wisest and coolest and fairest canvasser is often in great doubt whether the return ought to be received and counted or not.

What am I called on to act here? On the next day after the election the newspapers and the quidnuncs get from Tom, Dick and Harry who may [not] have even seen the returns, a statement of the result in the local precincts, and with perfect honesty, so far as their interests and partizan prejudices will permit, they so report them, and the public accepts their report as most probably true. But at last it is only hearsay, and more than all, these returns and the votes have not passed the scrutiny required by law of the canvasser, to wit: the County managers or Secretary of State or Governor, or as in this case the Ordinary, and it cannot be known, until this has taken place, what returns are to be acted upon, or what votes are to be counted. Is a statement of fact, so loose and unsubstantial, so liable to error and mistake, and above all so liable, when the tests of the canvasser have yet to be applied, and the result perhaps

changed very materially, to be accepted by a Court of Equity as reliable, which in this matter always requires certainty, before it puts its powerful and invasive hand into the matter by injunction? It seems to me not, and this is perhaps the reason, if no other exists, why in the reports of some forty or fifty Courts in these States running now for nearly one hundred years, there is not to be found a single case where this has been done. And that, too, where elections are so frequent as to justify the remark of a foreign traveller that Americans may well be described as an election-holding people. They are always at it, the ballot box always at work, the canvass never at rest.

I cannot act on such a statement as this, and grant an injunction upon it.

Besides that, I think the remedy at Law is complete and adequate, and the appeal to the Chancery side of the Court, to the one man power, to affidavits taken in the dark, with nobody present to cross-examine the witnesses, is not allowable.

Every question made in this bill may be made before the statutory tribunal, provided in the Act, to wit: the Ordinary. And if they are not satisfied with that, one tenth of the defeated party may, of right, invoke the same contest before the Superior Court that they are making here. The statute is broad—they may contest—true the Act says that if the contest is on the fairness of the election or conduct of the Ordinary, certain methods and recounts shall be had, but this does not limit the grounds of the contest. Indeed the Act makes special provisions to relieve any suspense, requiring the Court to hear their case at the first term, and specially providing for an appeal to the highest legal tribunal in the State—the Supreme Court. That no supersedeas can issue does not take away or seriously affect the legal remedy. There are many cases where no supersedeas issues nor does the Act even deny this; if the case

goes to the Supreme Court the case will stand, if appealed, as other cases on that subject.

The remedy at Law is in my judgment, complete, and no cause exists for an appeal to the extraordinary powers of a Court of Chancery.

One word more : this is a Republican Government, its whole machinery is dependent on the popular will as expressed in Elections. It is of the utmost importance to the public weal that Elections in all their details shall be free, and the Courts shall not interfere with them in any way, until the result is announced, and all the machinery of the Election and the expression of the popular will be exhausted.

Again : Objections to this bill are made on the ground of multifariousness, each of these parties may have rights, but they have no such connection as allows them to file one bill. And this, I think, is true. But this might be met by amendment, as by striking all except one party or set of parties out of the bill.

Suppose this done. Then it is insisted that one of the parties—say Paul Jones—has no interest not common to the Community, and that he has no right to come into Court to rectify a public wrong :

That the public may be trusted to protect itself, or if he desires to be the movant, he must apply the Attorney-General, who, I am bound to presume, will do his duty, and file a bill, in the name of the public, with him as relator.

It cannot be truly said that he has any wrongs under this bill, not more or less participated in by the Community, in one degree or other.

There are many men in Atlanta, as we all know, just as much injured as he is, and a very large number of people in a less degree, and each might file bills, and pray injunctions, the judgment upon none of which would bind anybody *pro* or *con.*, not a party, and the litigation be interminable.

Nobody who has given the least consideration to the subject can fail to see that the adoption of this Local Option Law is a tremendous experiment on the part of the city of Atlanta. Large sacrifices will have to be made by some of our citizens, and indeed pecuniary losses (it is to be hoped of only a temporary character) will fall upon a great many of our people. Notably, the large wholesale houses must suffer; the retail houses, the ordinary family grocery merchants, most of whom deal in considerable quantities, in some form, of spirituous liquors; the owners of real estate will doubtless be injured by the loss of rents, and the most of our people, white and black, will be largely interfered with in procuring what many of them deem a great luxury, and many look upon as a necessity for their health and comfort.

I suppose the trade in liquors of all kinds in this city must be largely over one million dollars. It is to be hoped that these larger losses will only be temporary; that the energy of the men whose business is thus stricken a death-blow will seek new channels for their means, and that other, perhaps just as profitable avenues of trade, will open, compensating all the class to which I have alluded, including the real estate men, and that in the end no real loss will come; whilst, as men believe, incalculable evils will be prevented, and immense good be attained, in the shape of industry, good morals, economy and virtue, fully compensating the losses to which I have alluded. It is safe, however, to say that the experiment is a serious one, and by no means so small or so plain a matter as many men in their enthusiasm say and think.

Let us hope that the friends of the measure, as it has succeeded, will not have cause to regret what has been done, and that far more good than evil will come from this experiment.

For these reasons I am compelled, by my conscientious

convictions of duty, to refuse to stay, by my single will, the declaration of the result of this election. Doubtless there are men as good and wise, and learned in the law as I am, who think differently. But it is I, and not they, whose position and duty requires action, and I must do as my sense of duty requires.

IV.—FOREIGN MARITIME LAWS.

II.—ITALY CODE OF COMMERCE. BOOK II. TITLE V.

The Contract of Bottomry.*

[Prestito a Cambio Marittimo.]

ART. 590. A Bottomry Contract must be in writing; if not so it resolves itself into a mere loan [*mutuo*], and only entitles the lender to interest at the legal rate.

The document must state :—

- (1.) The capital sum lent and the sum of money agreed on as interest or maritime premium [*profitto*].
- (2.) The articles on security of which the loan is made.
- (3.) The name of the ship.
- (4.) The name and surname of the captain or master.
- (5.) The names of the lender and borrower.

* Properly to understand the nature of this contract in Italian Law, and, indeed, in the law of most Continental States, it must be borne in mind that it covers not only what is considered the Contract of Bottomry in England, but also to a large extent that of mortgage of ships. When a loan on the security of the ship is contracted by the master (see Art. 595, *post*) the law is much the same in all countries; but the owners may under most of the Codes borrow money for any purpose not even necessarily connected with the ship on this security, thus practically constituting the lender a co-adventurer; it is also not limited to a single voyage (590 (6), 601). Formerly this was also the practice in England. (Dom of the Sea, 2nd Ed., pp. 592—598, 656, 659—661. Molloy, 314. See also Abbott on Shipping, 5th Ed., Part II. Ch. III., s. 17—21.)

(6.) Whether the loan is for one voyage or for a specified time.

(7.) The time and place for repayment.

B. Bk. II. 135, 140 as to mortgage. F. 311, G. 684, H. 570, N. 98, P. 1622, S. 812, 814, Sw. 129, E. 150.

M. and P. 561. *The Heinrich Bjorn*, 10 P.D. 44, 49.

591. A Bottomry Bond of a whole ship or a portion of one, when made within the Realm, must be registered in the Maritime office at the place where it is entered into, and must be noted in the ship's Register [*atto di Nazionalità*]. If made abroad, it must be registered by the Royal Consul at the place where it is entered into, and must be noted on the ship's Register.

The administrators of the Marine and Consular officers abroad must forward a copy of the Bottomry Bond to the Maritime office in which the vessel is registered.

They cannot register the bond unless the ship's register is produced.

The captain must take care that Bottomry made abroad in the place where there is no Consular officer or deputy of such officer be inscribed in the ship's register by the person who has authorised the bond, or by some other public official [*pubblico ufficiale*] of the place.

A captain who does not establish [*giustifica*] the bond by carrying out this form is personally liable to pay the Maritime interest. The original bond, or an office copy, must be forwarded, with an office copy of the document authorising it, to the nearest Consular officer, who must register the documents and forward them to the Maritime office above mentioned.

The contract is only of effect with regard to third parties from the time of its being noted in the ship's register.* In

* This most useful and simple provision is unknown to English law in the case of Bottomry, though a regulation, in many respects similar, exists in case of mortgage. M. and P. 55.

the cases for which provision is made by Arts. 489 and 509, the regulations of those Articles are applicable as well.

B. Bk. II., 139, 140, as to mortgage, 156. F. 312, G. 686, H. 571, 572, P. 1623, S. 813, E. 151, 152.

592. A Bottomry Bond "to order" [*all'ordine*] may be negotiated [*trasferito*] by being endorsed.

The form and effects of an endorsement [*girata*] are regulated by the provisions of Book I., Title X.*

The security for payment covers the maritime premium [*interesse marittimo*] unless otherwise agreed.

B. Bk. II., 144, as to mortgage, 162, 163 Diff., F. 313, 314 Diff., G. 685, 687, H. 573, N. 98, P. 1632, 1636 Diff., S. 815, Sw. 130, E. 154 Diff.

Ros. 93; Macl. 56; M. and P. 573.

593. Bottomry may be effected upon:—

- (1.) The Hull and Keel of a ship [*nave intiera*] or on a share in it only.
- (2.) The apparel [*attrezzi*] and furniture [*corredo*] and stores [*armamento*].
- (3.) The freight [*nolo*].
- (4.) The cargo [*carico*] or a distinct portion of it.
- (5.) The ship, freight and cargo jointly.

Mariners and those who follow the sea cannot borrow on bottomry on their wages or shares.

If, notwithstanding, such a loan is effected, the lender is only entitled to be repaid his capital without any interest.

B. Bk. II., 137, as to mortgage 157, F. 315, G. 681, H. 574, 575, 577, N. 97, P. 1637, 1640, S. 817, Sw. 126, 128, E. 155, 159.

Ros. 87; Macl. 55; News. 134; W. and B. Ch. III.; M. and P. 561—563.

594. A loan on bottomry effected for a sum greater than the value of the things on which it is made, is valid up to the amount at which these articles were assessed or agreed. The remainder of the loan is repaid with interest at the current rate of the place [*corso di piazza*].

If, however, there is fraud on the part of the borrower,†

* See note to Art. 555.

† Formerly punishable in certain cases with death in England (Molloy, 315).

the lender is entitled to require that the bond be cancelled, and money borrowed restored with the interest above-mentioned. Anticipated profit on goods shipped is not deemed to be an excess in value, if expressly declared.

B. Bk. II. 158, F. 316, 317, 318 Diff., H. 576, N. 103, P. 1638, 1642, S. 822, 823, ship is only allowed to be bottomried for three-quarter value, and cargo for value at port of loading. E. 156, 157, 158.

595. Bottomry can only be made by the owners of the articles bottomried, or by persons having their special authority for this purpose, with the exception of the powers vested in the captain by Arts. 507 and 509.

B. Bk. II. 156 Diff., F. 321, 322 Diff., G. 680, 681, 700 Diff., H. 579, 580, N. 6, 95, P. 1639, 1646, 1648—1650, R. 1060, S. 825, 826, Sw. 127, E. 161, 162.

See W. and B. 2nd Ed., p. 45, and note (s).

596. After the date on which the capital lent and the maritime premium become due, interest on the sum total is due only at the official rate.

B. Bk. II. 161, G. 688, N. 100, P. 1634, S. 839 Diff., Sw. 131.

Ros. 92, W. and B. 2nd Ed., 65.

597. If the voyage is broken up before the risk begins, the borrower must repay the money, with interest at the official rate from the day it was lent.

But if the voyage is broken up by his own act, he owes interest at the current rate, if that exceeds the official rate, and he must also give the compensation due to the assurer if the loan was insured.

G. 699 Diff., H. 586, 587, N. 103, 104 Diff., P. 1657, 1658, S. 828, Sw. 141 Diff., E. 169.

598. A lender on bottomry does not undertake the risk of deviations in the voyage or of a different voyage or ship from that stated in the bond, unless the alteration is necessitated by an accident [*caso fortuito*] or circumstance beyond the control of the parties [*forza maggiore*]. Similarly, the lender does not undertake the risk where any concealment or false statement on the part of the borrower causes him to depreciate the perils, or changes them. A change of the captain or master, even though

discharged by the owners, does not invalidate the contract, unless so agreed.

G. 694, H. 582, 587, N. 103, P. 1652, 1658, S. 832, Sw. 136—138, E. 164.

599. If the articles bottomried become a total loss by a casualty, or through circumstances beyond the control of the parties, within the time and place of the risks undertaken by the lender, the borrower is free.

In case of a partial loss, the payment of the loan is reduced to the value of the goods bottomried and salvaged, less salvage and such privileged debts as have a legal preference. When the loan is on freight, in case of a casualty payment is reduced to the sum due from the charterers [*noleggiatori*], less the wages of the crew for the last voyage, and share of salvage paid.

If the article bottomried is also insured, the value of what is saved is divided between the lender on bottomry and the insurer, in proportion to the capital sum lent only and the amount insured, respectively.

B. Bk. II. 164, 165, F. 325, 327, 331, G. 680, 691, H. 569, 588, N. 99, P. 1621, 1659, 1660, S. 836, 837, Sw. 126, E. 149, 165, 167, 172.

Ros. 91; Macl. 57; News. 137; W. and B. 2nd Ed. 56; M. and P. 572.

600. A lender on bottomry does not sustain losses and damages which happen in consequence of the inherent vice of the article bottomried, or which are caused by the borrower's act.

F. 326, H. 587, P. 1658, S. 832, E. 166.

601. If the period of the risk is not stated in the bond, it runs:—

(1) In regard to the ship and its appurtenances [*accessorii*], and also to the freight, from the time the vessel goes out of port until the day on which she is anchored or moored at her port of destination.

(2) In regard to goods, the period of the risk runs from the time they are loaded on board ship or in lighters to take them to the ship, until the day when they are delivered on shore at their destination.

F. 328 Id., G. 688, 699, H. 585, P. 1656 Diff., S. 835, E. 168.

602. A person who borrows on bottomry of goods carried is not freed by the loss of ship and cargo, unless he proves that he shipped on his own account goods at least equal in value to the sum borrowed.

F. 324, 329, P. 1654, S. 831, E. 170.

603. Lenders on bottomry contribute to General Average, and clear the borrowers to that extent ; any agreement to the contrary is null.

Particular averages are not chargeable to lenders on bottomry, unless so agreed, but if, in consequence of a Particular Average, the articles bottomried are insufficient to satisfy the creditor, the latter sustains the damage resulting therefrom.

B. Bk. II. 166, 167 Diff., F. 330, G. 691, 725, H. 589, S. 834, Sw. 134 Diff., E. 171.

TITLE VI.

Insurance against Perils of Navigation.

CHAPTER I.

The Contracts of Insurance and Obligations of the Insurer and Assured.

604. The regulations established by Book I., Title XIV., (a) are applicable to insurances against perils of navigation so far as they are not incompatible with marine insurances nor modified by the following provisions. Associations for mutual marine insurance are further subject to the provisions of Title IX. (b) of the same Book.

(a.) BOOK I., TITLE XIV., *The Contract of Insurance.* CHAPTER I., *General Provisions.* ART. 417. A contract of insurance is one by which the insurer obliges himself for a premium to indemnify the assured against losses or damages which he may meet with in consequence of certain accidental or uncontrollable events. . . .

H. 246, P. 1672, R. 1272.

News. § 125 ; M. and P. 438 ; Arn. 15.

ART. 418. Marine insurances are specially regulated in the 2nd Book.

ART. 419. Mutual Insurance Associations regulated by the provisions of Title IX. [of this Book, which see below, note (b.)] are also subject to those of this Title which are not incompatible with their peculiar nature.

ART. 420. The contract of insurance must be in writing.

The policy of insurance must be dated, and must state:—

- (1.) The name of the assured and his residence or domicile.
- (2) The name of the insurer and his residence or domicile.
- (3) The subject matter of the insurance.
- (4) The amount of money assured.
- (5) The premium of the insurance.
- (6) The risks taken by the insurer on himself and the time at which they commence and terminate.

H. 255, 256, P. 1682—1688, R. 1237 note, S. 840, 841, Sw. 204.

News. §§ 182, 132, 134; M. and P. 447; Arn. 216, Pt. I., Ch. V.

ART. 421. If the policy does not declare that the insurance is contracted on behalf of another person or the person whom it may concern [*per conto di chi spetta*] it is deemed to be made on behalf of the actual person who makes it.

An insurer may re-insure with another person things which he has assured.

A person assured may insure the insurance premiums.

The transfer of rights as against the insurer is effected by a transfer of the policy accompanied by a declaration signed by the transferor and transferee. It is of no effect as against third parties unless notified to the insurer or accepted in writing by him.

H. 267, 263, 256, P. 1696, S. 420, 847, Sw. 187—190, 205, R. 1261.

News. §§ 126, 127, 134, 184; M. and P. 443, 460, 461, 551, 549; Arn. 46, 93, 94, 97, 103.

CHAPTER II., *Insurance against Injuries*. SECT. I., *General Provisions*.

ART. 423. Not only the owner but also a creditor who has a lien or mortgage, and, speaking generally, any one who has an actual and legal interest in, or is responsible for, the preservation of an article may insure it.

R. 1235.

News. §§ 126, 129, 130; M. and P. 441, 442; Arn. 3, 50, 51.

ART. 424. An insurance against damage may be for the full value of the thing, or a portion of it, or for a definite sum. Any portion of a thing, or many things conjointly or separately, or everything collectively may be insured.

Anticipated profits or accruing rents in the cases allowed by law may be insured.

News. §§ 130; M. and P. 462; Arn. 35—37, 281, 313.

ART. 425. If an insurance against damage only covers a portion of the value of the thing insured, the assured sustains a proportional part of the damages and losses.

News. § 176.

ART. 426. Where the total value of the things insured is covered by a former insurance, they cannot be insured over again for the same period and against the same risks.

The second insurance will, nevertheless, be effective :—

(1.) If made conditional on the nullity of the earlier insurance, or the complete or partial insolvency of the first insurer.

(2.) If some of the rights arising out of the first insurance are transferred to the second insurer or renounced by the first.

R. 1260.

News. §§ 180, 184; M. and P. 461; Arn. 309, 310.

ART. 427. If the full value is not insured by the first contract, insurers who have signed subsequent contracts are answerable for the excess (in value) in the order of date of the contracts.

All insurances made on the same day are deemed to be made simultaneously, and take effect up to the full value in proportion to the amount assured by each of them.

News. §§ 180, 184; M. and P. 461; Arn. 309, 310

ART. 428. An insurance for an amount exceeding the value of the things insured is without any effect so far as the assured is concerned, if there has been fraud or bad faith on his part, and the insurer in good faith has a right to the premium.

If there has not been either bad faith or fraud on the part of the assured, the insurance is valid up to the value of the things insured; the assured is not obliged to pay the premium on the excess, but only owes a compensation equal to half the premium and not exceeding $\frac{1}{2}$ per cent. on the sum insured.

B. Bk. II. 188, 189, F. 357, 358, G. 790, H. 615, 622, 253, P. 1676, 1677, 1728, R. 1238, S. 856, 857, Sw. 191, E. 199, 200;

News. §§ 133, 171—180; M. and P. 555—559; Arn. 284—289.

ART. 429. A false or mistaken declaration, and any concealment of circumstances known to the assured, render the insurance null when the declaration or concealment are of such a nature that the insurer would not, if he had known the true state of affairs, have made the contract at all, or would not have made it on the same terms.

The insurance is null although the declaration or concealment are in regard to circumstances which in fact have had no influence on the damage to or loss of the things insured.

If there has been bad faith on the part of the assured, the insurer has a right to the premium.

News. §§ 169—171, 178; M. and P. 516, 519—524; Arn. Pt. II., Chs. I. and II.

ART. 430. An Insurance is null if the insurer, the assured, or the person making the insurance were aware of the absence or termination of the risk, or the happening of the damage. If the insurer only was aware of the absence or termination of the risk the assured is not obliged to pay the premium. If the person assured knew that the damage had already

happened, the insurer is not bound by the contract, but has a right to the premium.

B. Bk. II. 196, F. 365, S. 787, H. 269, 270, 597, 598, P. 1678, 1702, 1703, R. 1235, S. 893, 894, Sw. 210, 211, E. 207, 208.

News. §§ 169—171, 178, 137; M. and P. 558; Arn. Pt. II., Chs. I. and II.

ART. 431. An insurance is not considered to have come into operation if the thing insured has not been at risk, but the insurer has a right to compensation, the amount of which is determined in accordance with the provision of the last clause of Art. 428 [*suprà*].

B. Bk. II. 177, F. 349, H. 635, P. 1750, S. 889, 890, Sw. 218, 219, 272, E. 191.

News. §§ 177—180; M. and P. 555; Arn. 419, 410.

ART. 432. The liabilities of the insurer cease when any action of the assured changes or increases the risks by the alteration of material circumstances of such a description that if the new state of affairs had existed when the contract was made, the insurer would not have consented to the contract, or would not have consented on the same terms.

This provision is not applicable if the insurer has continued to carry out the contract after being aware of the alteration.

B. Bk. II. 182, 183, F. 351, 352, H. 638, 639, 643, 276, P. 1753—1755, R. 1257.

News. §§ 142, 144, 166; M. and P. 474, 475, 453; Arn. 251, 417.

ART. 433. If the assured fails before the risk has terminated, and the insurer has not been paid the premium, he can require security, or in default of security, that the contract be thrown up [*scioglimento del contratto*].

The assured has a corresponding right if the insurer fails or goes into liquidation.

ART. 434. The losses and damages which the things insured sustain in consequence of accidents, or uncontrollable circumstances of which the insurer has taken the risk, fall upon him. An insurer is not responsible for losses and damages resulting exclusively from the inherent vice of the article insured and not declared, nor for such as are caused by any act or default of the assured or of his agents, factors, or servants [*committenti o commissionari*].

He is not responsible for the risks of, nor for damages caused by riots, unless so agreed.

B. Bk. II. 183, 185, F. 352, 355, H. 276, 641, 643—645, P. 1674, 1755, 1757, 1761—1763, R. 1255 (h), S. 862, 863, Sw. 216, 224, E. 194, 197.

News. §§ 148, 149; M. and P. 480—483; Arn. Pt. III., Chs. I. and II.

ART. 435. The indemnity to be paid by the insured is regulated by the value of the things insured at the time of the disaster. If the value insured has previously been estimated, and agreed to by the insurer, he can only impugn this value, in case of fraud, simulation, or falsification, without prejudice to other proceedings even of a criminal nature.

If no estimate of value has been accepted, the value of the things insured may be established by any legal means of proof.

Excepting in the case of the provisions made in respect to insurances against the risks of navigation, the assured has no right to abandon to the insurer things which remain or are saved from the disaster. The value of things which remain or are saved is deducted from the sum due from the insurer.

B. Bk. II., 169, 187, F. 336, 339, S. 797, H. 619, P. 1680, S. 856, Sw. 192, 192. News. § 133; M. and P. 457, 458; Arn. 281, 285, 286.

ART. 436. The assured must give notice to the insurer within three days of the happening of the disaster or of its coming to his knowledge; he must, besides, do whatever he can to avoid or diminish the damage.

Expenses incurred for this object by the assured fall on the insurer, even though the amount of them added to that of the damage exceeds the sum assured, and though the object has not been attained, if it is not shewn they were unreasonably incurred either in whole or in part.

News. §§ 139, 171; M. and P. 490, 543; Arn. 854.

ART. 437. If the insurance be against damage or loss to movable chattels [*cose mobili*], (see Art. 480), payment of the indemnity made to the person insured frees the insurer when no objection is made to the payment.

ART. 438. An insurer who has paid over the damage to or loss on things insured is subrogated [*surrogato*] to all the rights which accrue to the assured against third parties in consequence of the damage. The assured is responsible for anything done by him which prejudices such rights.

If the damage has been made good [*risarcito*] only in part, the assured and the insurer act together to obtain their rights in proportion to what is payable to each.

News. §§ 181, 183; M. and P. 527; Arn. Pt. III., Ch. IX.

ART. 439. In case of transfer of the articles insured, the rights and obligations of the preceding proprietor do not pass to the transferee, unless it has been so agreed.

News. § 131; M. and P. 442; Arn. 103.

SECT. II. *Certain species of Insurance against damage.* ART. 440 relates to insurance of debts.

ARTS. 441—445 to Fire Insurance, and ART. 446 to Insurance of growing crops.

ART. 447. Insurance of goods carried may be for their value and necessary expenses as far as their destination, and the profits anticipated from the higher price that they will fetch at the same place.

If the anticipated profits are not clearly stated in the policy, they are not included in the insurance.

News. §§ 130 (4), 133, M. & P. 462, Arn. 23—29, 35—37, 65.

ART. 448. The risk of an insurer of goods carried begins from the moment at which the goods are delivered for carriage, and continues up to the moment of delivery at their destination, unless otherwise agreed.

A temporary interruption of the carriage and a change of route agreed on by the parties, or of the method of forwarding, does not free the insurer from the risk if they are necessary for the performance of the carriage.

News. § 146, M. & P. 474, 475, Arn. Pt. I., Ch. IX.

(b) BOOK I. TITLE IX., *Commercial Societies and Associations*. CHAPTER II., *Associations*. SECTION II. *Mutual Assurance Associations*. ART. 239. The object of a Mutual Assurance Association is to divide amongst the members damages occasioned (to one or more of them) by such perils as may be agreed on by the Association.

It constitutes, as regards third parties, a corporation [*ente collettivo*] distinct from the individuals composing it.

ART. 240. The existence of a Mutual Assurance Association must be proved by documents [*per iscritto*].

It is regulated by the agreements of the parties.

ART. 241. The Association is administered by certain of its members, whose appointment is temporary and may be revoked.

ART. 242. The rules respecting the responsibility of directors [*amministratori*], the publication of the deed of constitution [*atto costitutivo*], of the articles of association [*statuto*], of deeds which make any alteration in either of them, and of the balance-sheets [*bilanci*], of public companies, and the penalties relating thereto are applicable to Mutual Assurance Associations.

The provisions of Art. 145 should be shewn to be complied with by the said balance-sheets (Art. 145 requires, in the case of Italian companies, that a quarter, and, in the case of Foreign companies, half of the premiums and profits should be invested in the Italian funds).

ART. 243. The members are only obliged to pay the contributions as arranged in the contract, and in no case are they liable to a third party except in proportion to the value of the article [*cosa*] in respect of which they were admitted into the Association.

ART. 244. A person who loses the thing in respect of which he was a member ceases to be a member, except so far as he is entitled to be indemnified.

ART. 245. The Association is not dissolved by the suspension or death of a member.

The failure of a member may cause his exclusion.

605. A policy of insurance in addition to what is requisite under Art. 420 must shew :—

- (1.) The name, description, nationality, and tonnage of the vessel.
- (2.) The name and surname of the captain or master.
- (3.) The place at which the articles insured have been, or are to be, loaded.

- (4.) The harbour or roadstead whence the vessel sailed, or is to sail.
- (5.) The harbours or roadsteads in which the vessel is to load or discharge and at which she is to call.

If it is not possible to state the above circumstances, either because the assured is not in a position to do so, or from the special nature of the contract itself, their place must be supplied by others sufficient to indicate clearly what the subject-matter of the insurance is.

F. 332, H. 256, 592, P. 1684, R. 1237 note, S. 841, E. 174.

News. §§ 132, 134, 135; M. and P. 447, 451; Arn. Pt. I., Ch. V.

606. The insurance may be upon :—

- (1.) A steam or sailing ship, empty or loaded, armed or unarmed, alone or under convoy.
- (2.) The engines, furniture and apparel, equipment, stores and provisions.
- (3.) Passage money and freight.
- (4.) Goods shipped.
- (5.) Money lent on Bottomry [*cambio marittimo*.]
- (6.) Money paid or to be paid for General Average and disbursements made or to be made for Particular Average when not covered by Bottomry.
- (7.) And on all other things and values capable of being estimated in money in general, subject to the perils of navigation.

An insurance may be made on the whole or a part of the above-mentioned things, together or separately.

B. Bk. II. 168, F. 334, 335, 347, G. 782—784, 801, H. 593, 599, P. 1700, 1705, R. 1234, S. 848, 885, Sw. 186—188, E. 176, 190.

News. § 130; M. and P. 462—467; Arn. Pt. I., Ch. II.

607. The insurance is null if made upon :—

- (1.) The wages of seamen.
- (2.) Money borrowed on Bottomry.

Goods on which money has been borrowed on Bottomry

[or *respondentia*] can only be insured for the excess of their value over the sum borrowed.

B. Bk. II. 168, allows wages to be insured, 176, F. 347, H. 599, 600, P. 1705, R. 1234, Diff., S. 885, Sw. 188, E. 190.

News. § 130 (5) (6); M. and P. 465, 467; Arn. 40. 79, 80.

608. If there are several insurance contracts in existence, made without fraud on the same cargo by different persons having interests in it, or by several agents of the same interested person, who has acted without special orders [*incarico speciale*], all the insurances are valid up to the value of the goods. The persons interested have a right of action against each of the insurers at their own option, saving the right of the insurer who has paid to recover from the others in proportion to their interest.

F. 359 Diff., G. 792—795, H. 277, 278, P. 1772, R. 1260 Diff., S. 891 Diff., Sw. 192—195, E. 201.

News. § 184 (2); M. and P. 461; Arn. 310, 312.

609. An insurance may be made in peace time or war time, before or during the ship's voyage.

It may be for a whole voyage or for a definite period.

It may be for a voyage out and home, or only for one of the two.

A time insurance [*assicurazione a tempo*] is deemed to cover any voyage or any period during which the ship is laid up [*stazione*] during the agreed term, saving special agreements.

News. §§ 133, 134, 137, 148 (3); M. and P. 459, 460; Arn. Pt. I., Ch. VIII.

610. An increase of premium agreed to in time of peace for the case of war which may happen, and the amount of which is not settled by the insurance contract, is regulated by the Courts, taking into consideration the perils, and circumstances and stipulations of each policy of insurance.

B. Bk. II. 173, F. 343, H. 661, P. 1785, S. 879 Diff., E. 186.

611. If the period of the risk is not settled by the contract of insurance, the following rules are observed :—

In time insurances the risks begin to run from the date of the policy and terminate at the time agreed.

In voyage insurances [*assicurazioni a viaggio*] the risks begin and terminate at the time pointed out in Art. 601.

But if the insurance is made after the voyage has commenced, the risk runs from the date of the policy.

If the discharge of the goods is delayed by the default of the consignee, the insurer's risk ceases a month after the vessel's arrival at her destination.

B. Bk. II. 172, F. 341, H. 624, G. 827—831, P. 1736, 1737, 1739, 1743, 1747, 1749, R. 1242, 1243, S. 835, 871, Sw. 235, 236, E. 184.

News. §§ 133, 145—147; M. and P. 469—474; Arn. Pt. I., Ch. IX.

612. Goods, when loaded, may be insured :—

Either for their cost price and expenses of shipment and freight, or for their current price on arrival undamaged at their destination.

A valuation made in the contract for goods loaded, without further explanation, may be attached to either of these cases, and Art. 428* is not applicable if it (the valuation) does not exceed the higher of the above-mentioned values.

This valuation is always deemed to be made on the (faith of) the declaration of the assured, if it has not been preceded by a valuation accepted by the insurer, and on that account is subject to the rule laid down in the second clause of Art. 435.*

B. Bk. II. 187, F. 339, G. 799, 803, 804, H. 612—614, 619—623, P. 1718, 1729—1735, R. 1238, S. 853, 854, 859, 860. Ships can only be insured for four-fifths, goods of captain or skipper who is on board for nine-tenths of their value. Sw. 198, 199, 281, E. 182.

News. § 133; M. and P. 457—459, 545; Arn. Pt. I., Ch. VI.

613. If the values of the things insured are agreed to in foreign money, they are reckoned in coin of the realm at the rate of exchange at the time when the Policy was signed, if there is no agreement to the contrary.

B. Bk. II. 170, F. 338, P. 262, S. 858, E. 181.

* For these Arts. see Art. 604, note (a) *suprà*.

614. If the voyage is given up before the vessel sails, even though by the act of the assured, the insurance is annulled.

The insurer receives as compensation half the premium agreed on, but not exceeding one-half per cent. of the sum assured.

B. Bk. II. 177 and note, F. 349, H. 635, P. 1750, R. 1256, S. 889, 890, Sw. 218, 219, 272, E. 191.

News. §§ 142, 145, 180; M. and P. 555; Arn. 419.

615. All losses and damages which happen to the things insured by bad weather, shipwreck, stranding [*investimento*], collision [*urto*], compulsory deviations, changes of voyage or of vessel; by jettison [*getto*], explosion, fire, capture, piracy, and in general by all other perils of the sea, are at the risk of the insurer.

An insurer is not answerable for losses and damages which are the result of the inherent vice alone of the thing insured.

B. Bk. II. 178, F. 350, H. 637, 647—649, P. 1752, S. 861, S. 223, E. 192.

News. § 148, 149, 166; M. and P. 480—490; Arn. Pt. III., Ch. II.

616. War risks are not on the insurer unless so expressly agreed, if he has taken war risks without specifying them precisely he is answerable for losses and damages occasioned to the things insured by hostilities, reprisals, embargoes [*arresti*], capture [*prede*], and all sorts of annoyances [*molestie*] on the part of a government, whether friendly or hostile, *de jure* or *de facto*, recognized or not recognized, and in general for all the incidents and accidents of war.

B. Bk. II. 179, 180, F. 350, H. 647—649, P. 1752, 1765—1767, Sw. 234, 240, E. 186.

News. §§ 148 (3—5), 149; M. and P. 485; Arn. 696—703.

617. A deviation, or change of voyage or vessel, proceeding from the act of the assured, is not at the risk of the insurer, and the premium belongs to him if the time of his risk has begun.

A change of captain or master, even when discharged by the owners, does not invalidate the insurance, except in accordance with the provisions of the next Article.

B. Bk. II. 182, F. 351, H. 638, 639, P. 1755—1758, Sw. 219, E. 193.

News. §§ 142, 148 (7), 166, 177; M. and P. 138, 476—479, 452; Arn. Pt. I., Ch. X. and 228, 325.

618. The insurer is not liable for the deceits and offences of the captain and crew known under the name of barratry ("*baratteria*"), unless so agreed.

Such an agreement is rendered null if it relates to a captain mentioned by name in the contract, if the assured discharges him and replaces him by another without the insurer's consent.

B. Bk. II. 184, F. 353 Diff., H. 637, 640, 641, P. 1756, 1757, S. 862, Sw. 223, E. 195.

News. §§ 148 (7), 149, 151; M. and P. 452, 490; Arn. 705.

619. The insurer is not liable for the expenses of navigation, pilotage, laying the vessel up for the winter [*svernamento*], quarantine, nor for any species of taxes or dues imposed on the vessel and cargo.

F. 354, H. 708, P. 1825, S. 865, E. 196.

News. § 124, 150; M. and P. 431; Arn. 786, 823.

620. If the policy is on goods out and home, and if, when the vessel has reached its first destination, it does not load a cargo, or if it does not load a full cargo for the return voyage, the insurer only receives two-thirds of the agreed premium, unless otherwise agreed.

B. Bk. II. 186, F. 356, S. 866, E. 198.

M. and P. 459, 471; Arn. 365.

621. If the insurance is divisible on goods to be shipped in several vessels which are named, with a statement of the amount insured on each, and if the whole shipment is made in one vessel or on a smaller number than stated in the contract, the insurer is only liable for the amount which he has assured on the vessel which has received the shipment, notwithstanding that all the vessels mentioned may be lost.

Nevertheless, he has a right to the compensation allowed by Art. 614 for the amounts the insurances of which are rendered null.

B. Bk. II. 194, F. 361, H. 652, P. 1775, S. 869, E. 293.

M. and P. 451, 452, 457; Arn. 318—321.

622. If the captain is at liberty to go into various ports to fill up or shift [*cambiare*] his cargo, the insurer does not undertake the risk on the articles insured, except during the time they are on board, unless there is an agreement to the contrary.

F. 362, E. 204.

News. §§ 146, 166; M. and P. 471; Arn. 357, 364.

623. The insurer's risk ceases, and the premium belongs to him, if the assured sends the vessel to a more distant port than that mentioned in the contract, even though it be in the same direction.

The insurance is of full effect if the voyage is shortened, when the vessel puts into a port where she can be repaired.

B. Bk. II. 195, F. 364, H. 653, P. 1777, R. 1257, S. 862, 874, Sw. 219.

News. §§ 143, 144, 166, 177; M. and P. 475—479, 556; Arn. 345—349.

624. The sum which an insurer is bound to pay is limited to the amount of the insurance. If the goods which are insured sustain several disasters in succession during the period of the insurance, even in case of abandonment, the assured must always give credit for the amounts which have been paid or are due to him for the previous disasters.

R. 1252 Diff.

News. §§ 158, 175, 458; M. and P. 527; Arn. 841, 874.

625. The expression "free from average" [*franco d'avaria*] frees the insurer from all General and Particular Average, except in cases which allow an abandonment. In such cases the assured has the option between abandoning and taking proceedings (to recover) the average.

B. Bk. II. 198, F. 409, G. 838—851, H. 646, 719, 720, P. 1764, R. 1239, Sw. 234, E. 244.

News. § 150; M. and P. 491, 528; Arn. 735, 739.

626. The assured must give notice to the insurer of any

information which he may receive, to verify all damage for which he is liable. The notice must be given within three days of the receipt of the information, under penalty of paying for the damage.

The assured on cargo is under the same obligation, when the vessel is condemned as unseaworthy, even though the cargo has not sustained damage by the disaster.

B. Bk. II. 206, F. 374, G. 822, H. 654, 673, P. 1778, 1799, R. 1244, S. 877, Sw. 221, E. 214.

627. The assured must give notice to the insurer, within three days of their receipt, of the documents which prove that the goods insured were subject to the perils insured against and were lost.

The insurer may bring evidence of facts in opposition to those which are deduced from the documents produced by the assured. The permission to bring such evidence does not stay judgment against the insurer to pay the sum insured in the meanwhile, provided the assured gives security [*cauzione*].

The security lapses after 4 years if no judgment has been obtained against it.

B. Bk. II. 214, 215, F. 383, 384, G. 886, 888, 890, S. 882, 883, E. 221, 222.

628. In case of loss of goods insured and loaded on the captain's account on board the vessel which he commands, the captain must prove the purchase of the goods by the methods of proof allowed by the Commercial Law, and their shipment by a Bill of Lading signed by two of the principal members of the crew.

A member of the crew or a passenger who brings insured goods from foreign countries into the Realm, must leave a Bill of Lading with the Royal Consul at the place where the shipment was made, or, failing him, with one of the principal national [Italian] merchants, or with a person in authority in the said place.

B. Bk. II. 174, 175, F. 344, 345, P. 769, S. 853, 878, Sw. 188, E. 187, 188.

News. §§ 70, 130 (5), M. and P. 122, 465, 494; Arn. 25, 40, 42, 80, 81.

629. In case of a disaster of any description, the captain and the assured, or his agent, are bound to work for the recovery and preservation of the goods insured without prejudice to their claim against the insurers. The expenses must be repaid up to the value of the goods recovered.

The insurers, or their agents, may make provision either in concert with the captain and the assured, or their representatives, or by themselves, for the recovery of the goods insured or for their preservation, without prejudice to any claim (they may have).

H. 655, P. 1779, R. 1253.

News. §§ 134, 139, 157; M. and P. 159, 543, 490; Arn. 343, 871, 873.

630. The assured, when he gives notice to the insurer of information he has received, may reserve the right of making a separate demand for the payment of what may be due to him in consequence of the insurance.

B. Bk. II. 210, F. 378, E. 216.

M. and P. 539; Arn. 524, 527, 853.

631. An insurer must pay the amount due :—

In case of Particular Average, within 30 days from that on which the settlement of the accounts relating thereto was notified to him.

In case of abandonment, within 2 months from the time when the abandonment took place.

But the assured must, within these periods, prove the fact of the disaster which has given rise to the legal claim for Average or on abandonment.

If the claim is resisted, each of the defendants, and also the assured, may require that the amount be placed on deposit.

B. Bk. II. 213, F. 382, G. 892, H. 680, P. 1806, R. 1245—1248, S. 881, Sw. 269, R. 20.

M. and P. 546; Arn. 983, 1069

F. W. RAIKES.

V.—PENAL LAW IN ITALY AND SWEDEN.*

WE have received from opposite quarters of the Continent, from the Golden Shell of Palermo, and from the Venice of the North, several essays bearing upon various points of Penal Law, to which we desire to take this opportunity of briefly drawing the attention of our readers. The long and elaborate study given to the several Drafts of the Italian Penal Code constitutes a remarkable feature in modern Legislation, as the result has been practically the development of a Penal Code Literature, scattered through a mass of Review articles, Pamphlets, and Addresses on the opening of the Courts, the *Discours de Rentrée* of the French Magistrature.

From Sicily we have an Essay by Sig. Condorelli, Advocate in Catania, taking the shape of a criticism on certain Articles of the Draft Code presented to the Italian Chambers in the Session of 1883. We can, of course, only touch upon a few of the many points raised by Sig. Condorelli in his long and elaborate discussion of the Principles embodied in the Code. The Essay is one of pure criticism, the author believing it to be for the purposes of his work unnecessary to waste space on those portions of the Draft which have his approbation.

The Draft lays down imprisonment for a term of from 16 to 20 years for the citizen who shall bear arms against his State. A just subject for punishment in the case of the citizen, but not so, urges Sig. Condorelli, in the case of one

* *Sul Progetto del Codice Penale* (1883). Osservazioni dell'Avvocato N. CONDORELLI. Estratto dal *Gravina*. Catanzaro. Tip. Asturi. 1884. *Il Reato di Tentativo*. Dal Dott. G. MAJORANA CALATABIANO. Estratto dalla Rivista *Il Circolo Giuridico*. Palermo. 1884. *Le Principe Inquisitoire dans la Procédure Pénale Suédoise*. Etude par B. K. GRENANDER, Doct. en Droit. Extr. du *Journ. du Droit Criminel*. Paris: Marchal et Billard. 1884.

who has lost the character of citizen [*cittadinanza*], for whom a similar punishment is edicted. One who has ceased to be a citizen has ceased to owe the legal duty of defending his former country and obeying its Government, even though it were to be conceded for argument's sake that he still lay under a moral duty not to bear arms against it.

Moreover, there is a probability of the practical difficulty arising that such an one will take care not to present himself for punishment within the limits of his former country.

Voluntarily, no doubt, he will not cross those limits. Still, if as would seem to be the necessary hypothesis, the former citizen has entered the military service of a State at war with his original country, he may be compelled by the exigencies of War to cross the frontier, and find himself in the character of an enemy on the soil of his olden *patria*. If taken prisoner under such circumstances, it seems obvious that the case provided for by the second paragraph of Art. 94, criticised by Sig. Condorelli, will have arisen, and the punishment edicted for it will become applicable. The case is therefore not an impossible one, and, if it was desirable to provide for it in the Penal Code,—which is another question,—the paragraph containing it was not so superfluous as it seems to have been considered by our author.

The Press Laws of a country form an important branch of its Jurisprudence, and Sig. Condorelli is earnest in his pleading against clipping the wings of Thought. He fears that the language of Art. 110 forbidding the impugning of the inviolability of the person of the King, the order of the Succession, or the Constitutional authority of the King, must have this effect, in combination with the provisions of Art. 111 against blaming the King for the acts of the Government, and of Art. 112 against blaming the Law, or Institutions established by Law.

To impugn, our author argues, is to controvert with arguments. If he reads these Articles aright, therefore, it appears to him that it will not, under their *régime*, be possible to lay the blame, *e.g.*, of Treaties concluded against the interests of the nation, where that blame should properly rest, and profound silence must be observed respecting such a Law, for instance, as the much criticised Law of Papal Guarantees.

We may hope that this is hyper-criticism. But it is always well to have a case put strongly in so important a matter as the discussion of Laws proposed for the regulation of the Press in Constitutional States. If Sig. Condorelli should be deemed to have made his one point out of ten in any of his criticisms of the Draft Code, he will not have written in vain.

Sig. Condorelli does not believe in the extirpation of Duelling by the promulgation of severe nominal punishments. The principals, the seconds, and the medical men, he believes, universally bear false witness, when a case does come before the Courts, and the Courts themselves appear to select deliberately the minimum of possible punishments.

This is certainly not a satisfactory state of things, and it might be better to omit that chapter of the Code than to have it as a standing witness to the powerlessness of the Law in the face of so consistent a survival of the olden *vis privata*. Sig. Condorelli, however, would revise the relative Articles by edicting a fine of from 51 to 1,250 francs against the challenger, even though the duel should not actually take place. For *récidive* in this matter, he would award detention for three months, or a fine of from 51 to 3,000 francs. These measures seem fairly strong as against the challenger. With regard to Public Meetings held with a view to prevent the execution of a Law or Provision of the Public Authorities, where the Draft Code punishes a

meeting whose attitude is such as to inspire fear [*un contegno atto ad incutere timore*], Sig. Condorelli considers that this leaves the decision entirely to Government, and would amend by punishing only in cases where there were outward acts of violence or menace, *i.e.*, *vis publica*.

The question of the position of Bankruptcy under a Penal Code is an interesting one. Sig. Condorelli sets forth the considerably divergent views of various Continental Codes, and of recent English and American Legislation, and draws the conclusion that the act of Bankruptcy arising from the fault of the Bankrupt is not conclusively shewn to be matter for punishment. The wrong which such an one commits, says our author, is a moral wrong, but inasmuch as it does not violate a universal right, Moral Sanctions alone should suffice. Only when fraud [*operazioni dolose*] has been employed so as to abuse the good faith of others, does the punishable element arise, in the case of non-traders. With traders, it is otherwise. Sig. Condorelli, it will be remarked, distinguishes between traders and non-traders in his consideration of Bankruptcy, and there seems much ground for a distinction somewhat arbitrarily swept away in this country under our latest Legislation. On Robbery in its various forms, with and without violence, on Sacrilege, Extortion, Receipt of Stolen Goods, and other salient questions connected with Penal Law, Sig. Condorelli has numerous and pungent criticisms to offer. It is characteristic of the gulf fixed between Religion, as presented to Italians by the Roman Catholic Church, and Modern Society, that Sig. Condorelli altogether refuses to recognise any distinction between what we call sacrilege and robbery effected in a private house. He cannot, or he will not, see any difference between the cases, and he would fain that the Code should make none. Such a view of the question is by no means surprising in a country where the Church and Modern Society are opposing forces, and where

men must needs be ranged under the one banner or the other, with but a distant hope of the dawning of a day of Peace to men of good will.

In his elaborate Essay on Attempt (*Tentativo, Conatus*), Dr. Majorana-Calatabiano writes, in the main, as a disciple of the School of Romagnosi, and adopts the five-fold gradation of the offence laid down by Romagnosi and Nicolini, viz., Preparation, attempt (*attentato*), attempted offence (*reato tentato*), attempt with failure (*reato mancato*), attempt with success (*reato consumato*). Several Italian Jurists, such as Pizzoli, in an Essay, published in Florence in 1857, have gone so far in their theoretical refinements as to enumerate eight grades, while others make up a medium classification of six grades, by dividing the third head, *reato tentato*, into two, near and remote.

There may be excess in classification, just as there may be defect. The five grades of the Romagnosi School seem amply sufficient for the general purposes of Scientific Jurisprudence.

Dr. Majorana-Calatabiano, however, would himself like to divide off the manifestation of the criminal idea (*manifestazione del pensiero*) from the preparation to carry it into effect (*preparazione*). Only he would regard the manifestation of the idea as a criminous fact *sui generis*, rather than as an additional grade. On the whole, we agree with our author that the classification into a determinate number of grades cannot be carried out with mathematical exactness, and therefore the importance of any of the various systems named can only be relative.

The word Attempt (*tentativo*) itself, our author points out, is a somewhat vague one, and is employed not only in Penal Law but in Jurisprudence generally, and even also in Moral and Physical Science.

Dr. Majorana-Calatabiano himself defines the word

tentativo, for the purposes of Penal Law, as an act (*azione*) in which together with the essential conditions of crime (*reato*) there is a partial failure of execution or success, through fortuitous causes independent of the will of the agent.

Where the attempt has failed (*reato mancato*), our author, with Romagnosi, would, on all grounds, Moral, Juridical, and Political, counsel the application of a lesser degree of punishment than where it has succeeded. The considerations, however, on which this diminution of punishment should depend, he would leave to the discretion of the Courts.

The gravity of Attempt *per se* (*reato tentato*) appears to our author to differ from that of Attempt which has failed (*mancato*) in the proportion of major and minor (*reato maggiore, minore*).

For the Legislature to distinguish between the various shades of crime (*reato*) is in our author's opinion very difficult, and it is for this reason that in defining punishable attempt at crime, Legislators have stopped short at the one fundamental requirement of execution.

In truth, as our author justly observes, Crime is an indivisible whole, composed of thought, act, and effect, and therefore excess in refinement of gradation is not in the true interests of Justice. Taking the common threefold classification into Crimes, Delicts, and Contraventions, our author remarks that the last class is really one of simple Police, and not properly of Penal Law. Attempt, in this last class, is not, he says, punishable (*imputabile*), because it does not import a breach of Law, but a falling short in the observance of rules of good order.

The principle on which the punishment of attempted crime should be based, in our author's view, is the principle of execution. The moment this can be predicated, it becomes punishable. The attempt at crime may not be

carried out for various causes, some voluntary, some fortuitous and independent of the will of the agent. Examples of the former class, given by our author under the head of moral causes, are repentance (rather a rare case, it may be feared, in most offences), pity for the victim (perhaps equally rare), fear of the consequences, postponement of the purpose. Examples of the latter class, under the head of physical causes, are failure in presence of resistance, superior force opposed, want of the means of execution. Of these categories it appears to us that those which have most generally proved to have been of weight are the physical.

Our author would make voluntary desistance from the attempt obliterate the character of criminality.

Space will not at present admit of our following our author through the varying phases of Juridical Thought which he passes in review, nor yet through the valuable *précis* of the principal European Legislations on the subject-matter of his Treatise, with which he concludes his interesting work. We are not without the hope that we may be able to draw attention to some of these points on a future occasion. In the meanwhile, we may commend the very full and scientific Treatise of Dr. Majorana-Calatabiano as a valuable addition to the Literature of Penal Law.

We have already been indebted to Dr. Grenander, of Stockholm, for several contributions to the Literature of International and Penal Law, some of which have been noticed in previous volumes of this *Review*. We are now indebted to him for an interesting Essay on Swedish Penal Procedure (*Le Principe Inquisitoire dans la Procédure Pénale Suédoise*), to which we desire, however briefly, to draw the attention of our readers.

Starting from the primary fact of the two principles, either of which may govern Penal Procedure, the principle of Indictment (*principe accusatoire*), and the principle of

Inquisition (*principe inquisitoire*), Dr. Grenander sketches first the general, and then the particular history of these principles in relation, more especially, to his own country.

Early Procedure, he remarks, was altogether a debate or strife between the parties, and the Judgment of the Court was the result of this debate.

Gradually, as Society became more fully constituted, the individual gave place to Society, and an infraction came to be considered in the light of an infraction of the well-being of Society, and of the peace and safety of all its members. At this point arose the distinction between Civil and Criminal wrongs. And at this point also came to pass the substitution of the principle of Inquisition for the principle of Indictment.

Of late days, however, notably since the French Revolution, the tendency has been towards the re-emergence of the individual, and the return towards the principle of Indictment.

This process of development was followed in Swedish Procedure. In the earliest days, the offended individual had the right both to pursue and to renounce the right of pursuit, and if he renounced, no one else could pursue the offence. He had first the right, and then the duty, to appeal to the judgment of Society, and in either case the punishment awarded was a compensation to him, and to him alone. In the words of the Swedish Laws, he "received the peace of the defendant (*défendeur*)."

But as Society grew, as the *Hárad* (*centena*, Hundred) developed into the *Land* (*Province*), and the *Land* into the *Ríke* (*Etat*, State), the maintenance of Public Peace, the object and result of these consolidations became more and more the principal object of these Federations. First, the *Hárad*, then the King, came to receive a part of the Fine, and the injured party became bound not to renounce his action, or if he did renounce, the Bailiff of the King, or of the Bishop in

Ecclesiastical causes, had the right to take it up. And the State appeared daily more prominently on the scene, in the shape of the Penal Grand Justiciar. To this the laws known as the Laws of the Royal Oath (*Edsöres lagar*) bear the clearest witness. Throughout the 14th and 15th centuries, the Laws of Sweden affirm more and more the duty of the Royal Bailiffs to bring the evil-doer to trial. In 1540, we find in the Administrative Regulations of Westro-Gothia an officer charged with the duty of riding through the land at the head of a *posse* (*escouade*), to seek out crimes, and to enquire into the doings of men.

The Judicial Procedure was necessarily in harmony with these beginnings of an Inquisition.

It was only in the seventeenth century that the principle of Indictment (*principe accusatoire*) began once more to prevail. But even after that date, the Political animosities of the period known (oddly enough, it would seem to us,) as the "Time of Liberty" (1718-1772), obtaining the entire mastery over Law, brought into being a Procedure clothed with almost all the attributes of the ancient General and Special Inquisition, including even the application of Torture.

The Code of 1734, however, inaugurated a system of Penal Procedure which, although based upon the principle of Inquisition, applied that principle with a prudence and humanity quite exceptional in those days.

Such is a short sketch of the history of Swedish Penal Procedure, as it has grown out of the Code of 1734. Swedish Procedure is of a mixed character; the details of the existing system we must reserve for a future number, when we shall hope to return to the consideration of Dr. Grenander's interesting monograph.

Quarterly Notes.

Nubar Pasha and Egyptian Reforms.

We have drawn the attention of our readers in the present number of this *Review* to a subject, England's work in Egyptian Law Reform, with a prominence which we believe to be due alike to the importance of the subject itself and to the fulness and care with which it has been treated. We would now draw attention to the interesting monograph by M. Holynski on Nubar Pasha (*Nubar Pacha devant l'Histoire*. Par ALEXANDRE HOLYNSKI. Paris: Dentu. Preface dated December, 1885), which furnished our valued contributor with some of the groundwork of facts on which his article is based.

In that article the points requiring to be set forth were defined and limited by its title. There are other points of great interest to all students of International and of Constitutional Law which also deserve to be brought out from M. Holynski's pages. The author enjoys the rare privilege of having witnessed the Ottoman and Egyptian Constitutions at work, so that he is qualified to speak on a detail of the highest importance to us in our relations with the Ottoman Empire and with Egypt, viz.:—Is a Representative Government possible among the Eastern nations of the following of the Prophet of Mecca, or is it incompatible with their racial and religious instincts? On this question M. Holynski's opinion is given in the clearest and most emphatic terms, and it is of special value as the judgment of an eye-witness. He saw Midhat Pasha's too short-lived Constitution at work in Constantinople, and attended the sittings of the Ottoman Parliament. He convinced himself, he says, by what he saw and heard

during those sittings, that Deputies from the banks of the Nile and from the Golden Horn were perfectly capable of understanding Parliamentary forms and of using them with advantage to themselves and to their fellow-countrymen.

This is, moreover, as M. Holynski justly remarks, only what was to be expected, considering the pre-Islamic Tribal Parliament of the Semite, and the Palaver of the Hamite. It is therefore strictly in accordance with the ethnic characteristics of Africa, as well as of Asia, and it only needs the necessary room for development in the natural course of Local Institutions for Self-government. This testimony is very important, when we consider the nature of the grounds of our position in Egypt as they have been so clearly set forth alike by Lord Dufferin and by Lord Salisbury. The development of Representative Government must be a main care of our administration of Egypt as advisers of the Khedive, no less than the reform and extension of a pure Judicial system, each, of course, independent of all external pressure. The Egyptian form of so-called Representative Government is, unfortunately, scarcely better than a delusion.

In 1885, when the Chambers should have been convoked, at the date fixed for the convocation no summons was issued. The necessity for the summons had escaped notice. Presently, the omission was discovered and repaired, some months after the proper time. Such a circumstance clearly shews the Representation itself to be considered either a farce or an encumbrance, and in some quarters, no doubt, it may be considered to be both. But we ought never to allow a recurrence of so scandalous an omission, if we wish to be believed sincere in our professions of the good we desire to do in Egypt. Parliament, as it exists at Cairo, could very well have been forgotten without our presence. There was much that was just in the idea which was made the battle-cry of the Arabi movement, as Nubar Pasha

frankly admits. But he is careful to guard himself against the fundamental misconception that an Egypt under the rule of Fanatics is or ever could be the realisation of the true ideal of Egypt for the Egyptians. This true ideal of a free, constitutionally governed country, with a real Representation of all races and classes, and with a pure and independent Judicature extending its watchful protection against oppression to all the dwellers in the land of the Pharaohs, it is for us to embody in the Institutions created and to be created by us. From that ideal we must never permit ourselves to swerve, and when we shall have realised it, we shall have accomplished a task worthy of any people, however brilliant their achievements in the Past : we shall also have justified Nubar Pasha before the Tribunal of History.

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**The Solicitor-General on the Independence of the Bar and
the Duties of the Leaders of the Bar.**

The public utterances of the leaders of the Legal Profession in England must always attract special attention on the part of those in whose name they are entitled to speak. The general feeling of satisfaction, entirely unconnected with any considerations of party politics, which hailed the advent of Sir Edward Clarke to the high position conferred upon him by the present Administration, can only, we think, be increased by a close study of the language in which he expressed the nature of the relations to Bench and Bar of himself and the Attorney-General, at the Guildhall, Plymouth, on October 19, at the Public Banquet in his honour as Senior Member for Plymouth, and which we take from a reprint from the *Western Morning News*. The language employed by the Solicitor-General on this important occasion was evidently both carefully weighed, and the sincere expression of the speaker's views, and it went home as all sincere and well weighed words

must go home to the minds and hearts of those who study them. Sir Edward said, and said very truly, that the nature of the office to which he had been appointed was not essentially political, but that it embraced duties both very varied and very important. The Law Officers of the Crown, he remarked, have to advise the Government of the day upon the interpretation of Treaties, and they have also to advise upon the Acts which regulate the powers and authority of Municipal Bodies and Bodies of Local Government in this country. They are constantly consulted with regard to the rights of English subjects in Foreign lands and the rights of Foreign subjects who come within our territories. On most of these points, and notably in the matter of Treaties and our Foreign relations generally, we may observe *obiter*, the Government used also, and that in the first place, to have the advantage of consulting the Queen's Advocate, an advantage which, we believe, it has practically ceased to avail itself of for some years past, thereby throwing an increased burden upon Mr. Solicitor and Mr. Attorney.

But besides these and other duties within and without the walls of St. Stephen's, lightly but graphically touched upon by Sir Edward Clarke, there is the well-known position, the "duty," as Sir Edward called it, which lies upon the Solicitor and Attorney of being the "leaders of the Bar." This is unquestionably a "proud position," and it is no less unquestionably one which involves great responsibility. The conception of his office, as sketched by Sir Edward Clarke, is one of constant watchfulness, but it is one of Defence, not Defiance. The Solicitor and the Attorney have the right, as Sir Edward justly said, "to assert for the Bar, and with all respect to defend and insist upon the right of the Bar to fair and courteous audience on the part of the Judges." This right is of course correlative with the duty, fully acknowledged by the

Solicitor, of setting an example in their own conduct to the Bar which they have the honour to lead, and to set forth in that conduct the possibility of combining "the most zealous and industrious advocacy" at the Bar with "the most scrupulous and delicate sense of honour that ever was felt by an English gentleman." We think we shall only be expressing the general satisfaction at the promotion of the present Solicitor-General to which we referred at the outset, if we say that this satisfaction was largely based upon the feeling that in Sir Edward Clarke the Bar felt proud to add so zealous an advocate, and so scrupulous an English gentleman to the long and honourable Roll of Fame of the leaders of the English Bar.

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The Social Science Temperance Conference.

Temperance Legislation is an avowedly thorny subject, beset with difficulties, not a few of which arise from the want of moderation and of intelligent apprehension of the very far-reaching consequences of any Legislation on the question, usually displayed by the zealous on both sides. We therefore hail with pleasure, alike as a valuable contribution to the Literature of so important a subject, and as a no less valuable *vade mecum* of the opinions on both sides, the handy volume (*Transactions of the Social Science Association. Conference on Temperance Legislation*. London. 1886. Longmans), in which Mr. Clifford Smith, as Secretary, has embodied the Report of the Conference held at Prince's Hall, under the very able and impartial Presidency of Sir Richard Temple, in February last. The opening Address by the President was itself a model no less of a severely Judicial holding of the balance between contending opinions, than of conciseness and clearness. The meeting at once recognised that it was in the hands of a tried Administrator, and the proceedings were consequently marked throughout by a much greater

steadiness and thorough devotion to the work for which it had been convened than has been always seen in such gatherings.

The full and candid expression of the most opposite views was of course both to be expected and desired, nor was it in any degree wanting in the discussions. What the Social Science Association did desire was, as the President clearly stated in his Address, to bring the two parties face to face, perhaps for the first time, and by the personal communication thus brought about, to cause, as Sir Richard trusted this contact would cause, "some softening of hard-and-fast opposition, some relaxing of antagonistic strain." If anything can bring about this "softening," it will be a treatment of the question on the lines laid down in Sir Richard Temple's Address. If anything can delay or even altogether prevent this "relaxing of antagonistic strain," it will be the extreme statements of the would-be total abolitionists of the sale of so-called alcoholic beverages. We say "so-called alcoholic beverages" because it has been demonstrated that several of the so-called "non-alcoholic" or "Temperance" beverages really, and perhaps unavoidably, contain alcohol in proportions which would doubtless surprise the unsuspecting consumer. For the sake of the people at large and of the cause of true Temperance, it were much to be wished that this subtle form of danger could be eliminated from the already sufficiently considerable list of dangers to the nation. The supposition that the use of so-called alcoholic beverages can be absolutely prohibited we regard as a chimera. Were it not a chimera, it would itself be a great danger, if not one of the greatest. To suppose that, as Mr. Mott put it, the proposition could openly be made that "no Scotchman or Irishman should taste whisky again; that if a Frenchman crosses the Channel he must give up his claret, and the German his beer; that none of these

things should be procurable at any railway station, at any hotel, at any club, at the House of Commons itself," is no doubt an "utterly unpractical" view of things, which might be left to take care of itself, were the object pursued openly. But it is in the background, as Mr. Commissioner Miller, Q.C., shewed that he felt when he said that prohibition as opposed to regulation would be "one of the most atrocious pieces of class legislation ever attempted," and we certainly think, with the learned Commissioner, that "such an attempt would not succeed."

Many curious little details, almost worthy of the minuteness of enquiry of what are commonly known as "Society Papers," are to be found scattered through the discussions. Thus, under the head of the Licensing Laws, in the course of the remarks made by Mr. J. Saunders, representative of the "Licensed Victuallers' Association," we find a quotation from a letter of Mr. Herbert Gladstone in answer to an inquiry by Mr. E. Reade, stating that "Mr. Gladstone drinks a glass or two of claret at luncheon, and the same at dinner with the addition of a glass of light port. The use of wine to this extent is especially necessary to him at the time of great intellectual exertion." We are not in any way responsible, nor is Mr. Saunders, for procuring these personal details, and we do not know that we can admire their introduction into the controversy, but, having been introduced, they have their place in it, the true value of which it must be left for contending parties to determine. We have not thought ourselves justified in writing to Lord Salisbury's Private Secretary, in order to ascertain the nature and extent of the ordinary wine consumption of Mr. Gladstone's successor in the Premiership, for record in the present Note. We would draw attention to a recent American case, in another part of this *Review*, as illustrating some interesting points in Temperance Legislation. Taken as a whole, the *Report* of the Prince's Hall Conference

is an extremely interesting volume, well worthy of a place on the reference shelves of the Member of Parliament, as well as of the Philanthropist and of the Law Reformer. The thanks of all who are interested in the very important field of Legislation which it covers are specially due both to the Social Science Association as the convening Body, and to Sir Richard Temple as the able and impartial President.

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**Contrat à la Grosse and Maritime Insurance, at the
Antwerp Congress on Commercial Law.**

We have already, in general terms, drawn the attention of our readers to the importance of the Antwerp International Congress on Commercial and Maritime Law (*Law Magazine and Review*, No. CCLIX., for February, 1886), held in 1885, under the high patronage of the King, and organised under the able direction of Baron Lambermont.

We now desire to invite special attention to two valuable Essays contributed to the Literature of the Congress by M. Jacobs, in anticipation of its actual deliberations.

The Essays before us—(*Etude sur le Contrat à la Grosse. Etude sur les Assurances Maritimes et les Avaries. Par Victor Jacobs, Avocat. Bruxelles. Polleunis, Ceuterick et Lefébure. 1885*), are perhaps the more specially difficult for us to deal with, in that they themselves are exceptionally able reviews, condensed into the smallest possible compass, of the state of the law on the subjects of which they treat in practically all nations possessing any considerable commerce. On the whole, probably that which is most to be desired for the sake of English and American readers is that M. Jacobs should translate them and also complete them by a further sketch of the laws relating to Collisions at Sea, which in his preface to the pamphlet on Marine Assurance, he tells us he would have given but

for the fear of encroaching on the ground already occupied by his colleagues in the Organising Committee of the Congress. As a preliminary to that which not only the Jurist but the Merchant must desire, the assimilation of the Commercial and Maritime Laws of all Nations, it is very desirable that a clear and definite statement of what those laws are, and what is their practical effect, should be before the minds of all. At present, too frequently, the Jurist knows the cause, *i.e.*, the Law, and fails to appreciate its actual effect on commerce: the Merchant feels its effect, not unfrequently as an unpleasant surprise, but, not being previously warned by a knowledge of the cause, *i.e.*, the Foreign law, is unable to protect himself. M. Jacobs gives us not only the laws of the various states on the important branches of Commercial Law with which he deals but also points out the actual effects and results of those laws. The initial, and by no means the least difficulty, in dealing with the first of the two pamphlets by M. Jacobs, is to find a correct English translation of the term *Contrat à la Grosse*. Originally, no doubt, it was equivalent to Bottomree (Bodemery in Bynkershoek, and Bottomery in Molloy,) but both Legislation (see *Abbott on Shipping*, 5th Ed., Pt. II., Ch. III., § 19, p. 119) and commercial practice have combined to give this term a far more limited meaning in England. By the *Contrat à la Grosse* a shipowner is enabled to borrow money to fit out his ship for a voyage, or a merchant to complete the purchase of a cargo, on the terms that the lender is a joint adventurer, or sleeping partner, in the expedition, looking to its favourable termination for the reimbursement of his capital with the high rate of interest agreed on, as well as what is now understood by a Bottomree contract by which a captain or owner is enabled, at a foreign port, in the course of a voyage, when unable otherwise to obtain funds for repairs or supplies necessary to complete the voyage, to pledge

ship and freight, and even cargo, for the repayment of advances, while retaining the actual possession of them.

In England, at present, the former of these purposes could only be accomplished so as to give a special claim against the ship alone, by constituting the person who advanced the money a co-owner of the ship, and then but partially, as the lender would, in the event of the ship's safe return, only have those shares of which he was owner to look to for his repayment, instead of the whole ship, and besides, would incur all the responsibilities of an owner in respect of these shares, and would in fact become an active instead of a sleeping partner in the adventure.

Our Legislature, and more recently the Legislatures of France (1874) and Belgium (1879. See *Law Magazine and Review*, 1885, pp. 194 *seqq.*), have endeavoured to cover the ground by special laws relating to the mortgage of ships, but there is this great difference between a mortgage and a *Contrat à la Grosse*, that by the former, the ship is only a security for a loan which is still payable if the ship is lost; by the latter, the loan disappears with the ship. The objections to the *Contrat à la Grosse* form of Bottomree were primarily that it encouraged a species of gambling, and secondarily that, as no record of it appeared on the ship's papers, it created a secret lien to the prejudice of other creditors. That these objections are still felt is shewed by the fact noticed by M. Jacobs (*Etude sur le Contrat à la Grosse*, p. 9, § 9), that the Belgian Code as recently amended (see *Law Magazine and Review*, for 1885, pp. 99 *seqq.*) has practically limited the *Contrat à la Grosse* to Bottomree in the English sense at the same time that it made special regulations very similar to those of English Law on the subject of the Mortgages of Ships. Whilst dealing with this subject, we must, however, deprecate a statement made by M. Jacobs (*op. cit.*, p. 10, § 11) to the effect that in Great Britain and the United States,

differing in this respect, as he says, from the rest of the civilised world, fictitious loans on Bottomree or Contracts *à la Grosse* are by custom allowed; that is, that a person wholly unconcerned in the ship or cargo borrows money payable on their safe arrival, and presumably only in that event. It is true, he goes on to say, that such contracts have no connection with true Bottomree, are useless, and confer no privilege, and are in fact bets; which amounts to a statement, hardly borne out by facts, that Englishmen and Americans are fonder of gambling than persons of other nationalities, and is at all events scarcely in place in a dissertation on the Commercial Laws of Maritime Nations. M. Jacobs is in error in his statement of English law where a Bottomree Bond is transferred to a third party. He says (*op. cit.*, p. 28, § 22) that the bearer or endorsee of a Bottomree Bond must before suing upon it have the hypothecation regularly transferred to him on the Register. But, as has been already pointed out, a Bottomree loan in England nowhere appears on the ship's papers, and one of the reasons for limiting it to cases of necessity is that it constitutes a secret lien, and obviously, no transfer can be effected on the Register of that which does not exist there. M. Jacobs points out indeed (*op. cit.*, p. 20, § 17) that in most States a loan contracted by the owner before the commencement of the voyage (*prêt antérieur*) has to be registered (at the ship's home port) within a certain limited time, in order to render it effective as against third parties, yet that a loan, usually to the captain for necessities, in the course of a voyage, is not, as a rule, required to be so registered, and, as has been already pointed out, the latter is the only form of Bottomree at present known to English law. In the same section M. Jacobs points out that the recent Italian Maritime Code (see *ante*, *Foreign Maritime Laws. Italy. Art. 590, seqq.*), requires all Bottomree loans to be noted on the ship's papers on board. If it is not out of

place to make a suggestion here on the subject, it would seem that this simple arrangement clears away all the difficulty of a secret lien. It also appears to us that *Contrat à la Grosse*, in the Continental sense, is a convenient means of enabling an owner to raise money for the purposes of the voyage, and, if registered, would not prejudice other creditors acquiring a lien or privilege on the ship subsequently, and that a loan on Bottomree to the captain abroad, for the necessities of the ship, should require the authorisation of the Consul or other public officer for its validity, and by such authorisation being entered on the ship's papers on board, and notified officially at once to the Registrar of Shipping at the ship's port of Registry at home, a similar result would be arrived at as far as possible in the latter class of cases, and the delay at present caused by the necessity for communicating or attempting to communicate with the owners would be avoided. In fact, whilst cordially agreeing with the first of the conclusions of M. Jacobs (*op. cit.*, p. 38, § 5), that it is extremely desirable that general Maritime Law should classify and marshal the various privileges or liens upon ships and cargoes, we cannot consider that he has altogether established the second, that it is desirable to abolish the form of *Contrat à la Grosse* preparatory or previous to the sailing of the ship (*prêt antérieur*), whilst as to the third and last, that the Law of the Flag should be limited to control only the form of a voluntary sale of a ship, and the constitution of mortgages of ships, and bottomry contracts, it is obvious that if so limited it must be by the laws of the several States and by Treaties between them, which laws would be *ipso facto* the laws of the respective flags, and that therefore the Law of the Flag, amended, indeed, and generalised, would still govern all maritime contracts. There are many other things in this essay which are well worthy of notice, especially the relations of Freight to Bottomree :

but we must turn to the consideration of the subject dealt with by M. Jacobs in his other essay, viz., Marine Assurance and General Averages. M. Jacobs commences by informing us that English law has no special provisions for Marine Insurance, a statement true, no doubt, in the sense in which it is meant, namely, that we have no law corresponding to that of the Continental Codes on the subject, our Legislature having up to the present time contented itself with declaring illegal certain insurances or contracts professing to be Insurance contracts, *e.g.*, those known as wagering policies, and has left it to the parties to enter into such *bonâ fide* contracts as they please, and to the Courts of Law to interpret those contracts in case of dispute. But from the decisions of the Courts it would be possible to compile rules fairly analogous to those of other States, were it deemed desirable to do so, and indeed it is probable that those learned men who composed the French Code of 1807, which is the putative parent of most, if not of all, the other Continental Codes, when drawing it up consulted not only the works of the great Jurists of their own country, but also the decisions of great Judges in ours. He then goes on (*Etude sur les Assurances Maritimes et les Avaries*, § 2) to enlarge on the text that Assurance is a contract of indemnity, which, again, is true in a sense, namely as he says (§ 3) in that no one should be allowed to enrich himself by such a contract, that is, that he should not be able to over-insure his property. M. Jacobs also points out (§ 7) that some countries, with the view of making it the interest of the insurer to preserve the property insured, have forbidden the insurance of anticipated profits, and in some cases, *e.g.*, Spain (§ 10), have limited insurance to a certain proportion of the actual value of the thing insured. He then mentions the fact that in the ordinary form of a French Policy—and, so far as we are aware, of all other policies—the Collision clause limits the liability of the assurer

to a proportional part, in France 9-10ths, of the amount which may be payable to others in case of collision. M. Jacobs then proceeds to urge the obvious difficulties of preventing over-insurance in the case of valued policies, a difficulty about which so much has been said and written in this country in the last few years that it is needless to discuss the matter here, though perhaps the following clause which he quotes from the French Policy on goods may, with the necessary modifications to adopt it to ships and freights, &c., supply a solution of the difficulty. "Notwithstanding that all values are agreed, the assurers "may in case of a claim for loss or damage require proof "of the true values and in case of exaggeration reduce the "sum assured to the purchase price of the goods plus "10 per cent., unless a greater increase of a specified "amount has been expressly agreed on." Here at all events, the fear of not getting the full amount for which premium has been paid, after a very expensive and exhaustive enquiry into the actual value of the articles insured, and in addition of having to pay costs of the enquiry, would act as a considerable check on over-insurance. On the other hand, the odium attaching to assurers who should attempt to get out of their contract after accepting the premium, and the possibility in case of failing to prove a substantial over-insurance, of having to pay the costs of the enquiry would prevent assurers from going behind the policy to ascertain the actual value, in all excepting gross cases. M. Jacobs does not deal at great length with the now very general method of Mutual Insurance where the contract, though primarily one of indemnity against all or special losses, yet, from the fact of its mutuality rendering the assured himself liable to contribute to the like losses incurred by his fellows, partakes largely of the nature of a partnership contract, and, in consequence, through the knowledge of each member of the values of the ships of

the others, and through the fact that the contributions to the losses of others are made *pro ratâ* on the insured values, must, one would think, tend to check over-insurance. A very interesting paragraph (§ 23) is devoted to the subject of "Barratry of the Master,"—where the primary difficulty is not of translation (for the word is practically the same in all languages, being borrowed by all from the French word, *Barrateur*, a deceiver or cheat, and appearing in Scotch law as the name of the offence of selling judgments), but rather of interpretation—shewing that whilst all authorities consider it to mean fraud, some would extend it to cover also errors of judgment and acts of carelessness and imprudence, the conclusion of M. Jacobs is that whilst its original meaning is the more limited one, custom has for a long time extended it to the latter. If this is held to be the meaning of the term in other maritime countries, it certainly is not so in England, as here the word retains, so far as Maritime law is concerned, its more limited sense. M. Jacobs also says that Barratry of the Master implicitly includes Barratry of the Crew,—a view which certainly could not be maintained in English law, though as the policy usually mentions "Barratry of Master and Mariners" the same result is attained. Perhaps it would be well if, as M. Jacobs urges (*Assur. Mar.*, p. 37), Foreign Codes and Policies of Insurance, both abroad and at home, would give up the use of an obsolete, obscure, and ambiguous term; and follow the example of the German Code (Art. 824) in substituting for it "The risk of dishonesty or default of any member of the crew, so far as a loss may thereby be entailed upon the insured object." (Wendt's *Maritime Legislation*, p. 292.)

Another very interesting section (§ 33) deals with the conflict of rights which arises under the Foreign Codes where the owner's liability to third parties is limited by the value of the ship and freight, and cleared by an aban-

donment (*abandon*) of them to his creditors whilst at the same time by an abandonment (*délaissement*) to the assurers he is entitled to the full insured value of the ship, and freight if that is insured. Thus for example, a ship worth £20,000 and insured for that amount and with freight insured at £1,000, by the negligence of her crew runs down another ship, say of similar value, and sinks it, she herself being so damaged as to be condemned, and the cargo, of perhaps perishable goods, so much damaged as not to be fit to forward to its destination, so that no freight is earned. In this case, the owner, by abandoning to the owner of the innocent vessel the remains of the wreck worth, say £1,000, is clear of liability to him, whilst he recovers from the underwriters the insured value plus such portion of the damage he has to pay, say nine-tenths, as is covered by the Collision clause, less the value of the wreck to which the underwriter is also entitled. With our English system of limiting the liability of an owner for collisions, amongst other things, to £8 per ton, assuming the two vessels spoken of above as of 1,000 tons each, the owner of the wrong-doing vessel would have to pay the other £8,000, and would recover from his own insurers a proportional part of that sum in accordance with the provisions of the Collision clause. M. Jacobs (*op. cit.*, p. 57) thinks that a basis for reconciling the English and Foreign systems may be found by making the insurance money recovered by the shipowner represent the ship itself, and therefore a fund available for the owner of the innocent vessel to recoup his loss out of. There is, however, this obvious difficulty, that there is no duty imposed on a shipowner to insure at all, and very frequently, especially in the case where many ships belong to the same owners, they are not insured at all. Under these circumstances, such an arrangement as that suggested by M. Jacobs would make the reimbursement of the innocent owner dependent on the accident of the guilty one being insured, whereas, by

English Law it is theoretically wholly independent of that fact, though dependent on the almost equally irrelevant question of the tonnage of the wrong-doing ship. It is perhaps too much to expect from a discussion of the Law of Average which only extends to some twenty pages that all the questions which arise should be touched on, but it would certainly have been interesting to see how a foreign Jurist would deal with the important and intricate questions decided by the Court of Appeal and House of Lords respectively, in the recent cases of *Attwood v. Sellar*, and *Svendsen v. Wallace*. As recently pointed out in this *Review*, we venture to think that the principle on which the latter of these two cases was decided is widely misunderstood here, and on this account it would be the more instructive to see how the same question is viewed abroad. M. Jacobs only finds room for three different definitions of a General Average Act (§ 38), and an attack on Articles 423 and 425 of the French Code, which are reproduced literally in the New Belgian Code as Articles 111 and 113, and, with a slight addendum, as Article 641 of the Italian Code. He however cites with approval a decree of the French Court of Cassation, from which perhaps the whole Law of Average, General and Particular, may be deduced. At all events the statement of the Law therein contained is so beautifully clear and concise that no excuse is needed for reproducing it here from the text of M. Jacobs (§ 60). "The nature of an Average, General or Particular, is irrevocably fixed at the moment it is complete, whether the act is a voluntary one having for its object the interest of the whole adventure or a casualty arising from circumstances beyond the control of the parties (*force majeure*)."

We have only space to notice one other curious diversity of law, as to General Average. Whilst all States agree in exempting from contribution the ship's stores and provisions, and, either explicitly or implicitly, the kits and wages of the crew, we find (§ 46) that in Holland, Germany,

Portugal, and Belgium, passengers' baggage is also exempt, but whilst itself exempted from contribution, is, if lost, the subject of contribution. We are told that this is justified by the slight importance of the matter, and the great difficulty of otherwise arranging it. This may well be a reason for it not being called on to contribute, but hardly for making other things contribute to it. In the latter case, where the baggage is lost or damaged, the difficulty of arriving at its true value would be even greater than where it was saved and other cargo lost or damaged. The principle seems anyhow difficult to defend, but perhaps it is, as was argued in the case of the *Cargo ex Schiller* (1 P.D. 475; 2 P.D. 145), that passenger vessels are usually a higher class of vessel, better found and better manned, and, that being so, the shipper who sends his goods or specie by such ships runs less risk of losing them, and is under no hardship if, in consequence, he finds himself constituted an involuntary insurer of the property and life of the passengers.

In conclusion, we can only reiterate the hope with which we commenced that these essays may, ere long perhaps in a more amplified form, find their place in the offices of our merchants, and in the studies of our legislators, and be read, marked, learned, and inwardly digested by them before any fresh attempt is made to deal with the law of Marine Insurance. Such essays as those of M. Jacobs are probably among the best work of Congresses on International Law, and we cannot but think that their funds would be well expended in making them more accessible to that portion of the public which is interested in these questions, both by translating them into various languages and by taking other steps to make them more widely known. Meanwhile the best thanks of Jurists and Merchants alike are due to the Belgian Government for its constant support of all measures tending to promote the interests of Commerce and the advancement of Peace.

Reviews.

International Law and International Relations. By J. K. STEPHEN, B.A., of the Inner Temple, Barrister-at-Law. Macmillan. 1884.

Essays on some Disputed Questions in Modern International Law. By T. J. LAWRENCE, M.A., LL.M., Deputy Whewell Professor of International Law, Cambridge. 2nd Ed. *Revised and Enlarged.* Cambridge: Deighton and Bell. London: G. Bell and Sons. 1885.

Leading Cases and Opinions on International Law. By PITT COBBETT, M.A., B.C.L., of Gray's Inn, Barrister-at-Law. Stevens and Haynes. 1885.

In Mr. J. K. Stephen we have a new writer, the inheritor of a name long distinguished in English Legal and Historical Literature, and who takes up a position of somewhat Radical antagonism to the ordinary treatment of his subject. In Mr. Lawrence we have the renewed assertion of that treatment by an experienced teacher of the subject within Mr. Stephen's own University. Thus it may be said that discord has entered into the camp, and that we must decide under which side to range ourselves. It appears to us, on the whole, that "the Old Customs should prevail," as was said long ago in days of ardent Church controversy. For we are at one with Mr. Lawrence in seeing no adequate benefit likely to result from the change of nomenclature proposed by Mr. Stephen, while the disadvantages seem obvious. Whether there could well be such a person as a Professor of "International Relations," we must leave to the incumbents of the several Chairs at present styled of "International Law" to decide for themselves. No doubt International Law is often very badly observed, and International Relations are often very strained. So Municipal or Territorial Law is often very badly observed, and we have regretfully to confess that we do not find the lieges walking by any means steadily in the way in which they should walk.

It is undoubtedly true that many infractions—and very gross infractions, too—of International Law can be adduced from

various periods of European History. Some of these are pretty recent. So are many infractions of the Municipal or Territorial Law, and of the Moral Law. But we do not therefore rush to the conclusion that there is no Municipal Law, or that there is no Moral Law. This seems to us to constitute an objection *in limine* to the adoption of Mr. Stephen's view. It is no doubt true that many difficult cases may from time to time arise under International Law, as is suggested by Mr. Stephen. But the same is true of any branch of Law, and we do not therefore proceed at once to say that it is no Law. It is possible, no doubt, that the legal fiction of the Exterritoriality of Sovereigns, and of Ambassadors and other Diplomatic Agents, might be put to a severe test by the outrageous conduct of some individual Sovereign, or of some individual Diplomatic Agent. Instances are not far to seek, and they have come to hand since Mr. Stephen and Mr. Lawrence published their respective volumes. The case of Prince Alexander of Bulgaria and the case of General Kaulbars will, in their several ways, each be in a certain sense, a *cause célèbre*, though no European Concert may have protested on either occasion.

On any view which it seems possible to take of his position, the abduction of Prince Alexander can only be considered a singularly gross infraction of International Law, International Morality, or International Relations,—whatsoever be the name we prefer to use.

On any view of the position, and of the correlative rights and duties of a Diplomatic Agent, the attitude and the unquestioned acts of General Baron Kaulbars can only be considered a singularly gross infraction of International Law, International Morality, or International Relations.

We must hope that such extreme cases of the abuse of positions properly clothed with immunities will not soon recur. But we cannot, because they have occurred, proceed to despoil Sovereigns and Diplomatic Agents of their immunities, any more than we can proceed to imprison a whole county because a series of deeds of violence may have been committed within its body. Yet we are glad that Mr. Stephen has published his Essay for the King's College Fellowship, as we are glad of any publication, in any branch of Law or History, which gives evidence of originality and thought. We desire that all phases of Modern Thought should be represented in Inter-

national as in Municipal Law, whether we can agree with them or not.

The present condition of the Egyptian Question, to which we devote much space in the present number of this *Review*, lends a fresh importance to Mr. Lawrence's scheme for the erection of the lands bordering on the Suez Canal into a Neutral State. We do not, indeed, ourselves think the scheme one easy of realisation, but we are glad that it was placed before the public in our own pages, and we commend it with the rest of his interesting volume to all men of good will.

Mr. Pitt Cobbett supplies the Student of Diplomacy and International Law with a useful manual of Leading Cases and Opinions, with Notes and Excursus, designed for their further illustration. It has not been constructed so much with a view to strict scientific accuracy, as to practical utility. We do not quarrel with this feature of the work, as it is likely to increase the general usefulness of the book for the purposes of the student. There are Cases which we should have liked to have seen more fully reported.

Thus, *Forbes v. Cochrane* is a case not at all well understood generally, and it is one presenting some special features of interest. The position of the British ship-of-war in the Territorial waters of Cumberland Island, at the time when the slaves took refuge on board, is not adequately brought out in Mr. Pitt Cobbett's statement of the case. But we could say the same of most statements which we have seen of that *cause célèbre*.

The waters were the Territorial waters of an island belonging to a State where slavery was a legal institution. But the island was occupied by British troops. It may therefore be questioned what was the technical position of those alleged slaves at the moment of their taking refuge on board this British man-of-war. It seems at least possible to hold that they were not slaves, *de jure*, at least in the eyes of the British Law. A question might, of course, be raised as to what constitutes military occupation, and what are the Juridical consequences flowing from it. In such a case as that of slavery, we apprehend that the institution would fall with the British occupation, though it would no doubt revive on the abandonment of the slave-holding country by the British Forces.

We must leave other interesting points in Mr. Cobbett's book for the student to discover, though there are some to which we may ourselves recur hereafter.

Constitutional Law viewed in relation to Common Law, and exemplified by Cases. By HERBERT BROOM, LL.D. Second Edition, by GEORGE L. DENMAN, LL.M., of Lincoln's Inn, Barrister-at-Law. W. Maxwell and Son. 1885.

Broom's *Constitutional Law* is an inheritance in which we all seem to have a share, and with which we could not readily part. Yet it is simply the truth to say that it is not a scientific Treatise on this deeply important subject, though it unquestionably is, and for many reasons must remain, a standard text book. The reason of this apparent contradiction would seem to be that Dr. Broom's work is a treasure-house of reference for the Practitioner in Parliamentary and other Constitutional cases, and equally a treasure-house for the student of Constitutional Law and History. It therefore rightly maintains its place, and we cannot but welcome Mr. Denman's new edition. At the same time, we feel no little regret that Mr. Denman should not have felt at liberty to do somewhat more for Dr. Broom than it is evident that he did feel at liberty to do. The most satisfactory thing, perhaps, would have been to have recast much of the original work, and thrown it into a more modern and scientific shape. Failing this, we suppose that scrupulous adherence to the method—or want of method—of Dr. Broom was an unavoidable feature of Mr. Denman's edition, and we accept it as such, after the necessary expression of our regret. But the regret itself follows us throughout the bulky tome in which the curious niceties of Ligeance, as it existed in the olden time, and of Ship Money, and other such Constitutional Dodos, are enshrined and almost lost to view.

From the circumstance of the practical reproduction of the original Treatise, we scarcely find ourselves in the presence of much that we can make the subject of criticism, our chief *gravamen* being, as we have said, that Mr. Denman has so studiously "effaced" himself. We should have been very glad of notes embodying his views on points of interest in the old cases, and we should have been equally glad of the introduction of much more than he has allowed himself to insert of new matter. What has been inserted in the way of new matter is of considerable value, slight as its amount is in relation to the bulk of the whole work. We can only hope that more of the editor's personality will appear in future recensions.

The Patents, Designs and Trade Marks Act, 1883, with Notes and Index to the Act, Rules and Forms. By T. ASTON, Q.C. Stevens and Sons. 1884.

The Practice as to Letters Patent for Inventions, Copyright in Designs, and Registration of Trade Marks, with the Practice in Actions for Infringement of Patent, arranged as a Commentary on the Act of 1883, with the Rules and Forms, and an Appendix of Orders made in Patent Actions. By WILLIAM NORTON LAWSON, M.A., of Lincoln's Inn, Barrister-at-Law, Recorder of Richmond. Butterworths. 1884.

The Patents, Designs and Trade Marks Act, 1883, with the Rules, Forms, and Practice thereunder, &c.; together with Notes, Cases, and a complete Index. By ROGER W. WALLACE, Barrister-at-Law. Wm. Maxwell and Son. 1884.

In the volumes whose titles stand at the head of this notice we have three books on the Patents Act of 1883, differing in usefulness, and in ingenuity in the matter of elaborate and rather exhausting title-pages. The first feeling to which this catena of authors gives rise in our mind is the duty of once more placing on record a protest against the growing evil of making books by reprinting an Act of Parliament, and adding thereto a few casual notes and reflections. We have protested before, and we can only protest again. Subject to this, we are interested to read such reflections as a lawyer so experienced as Mr. Aston has thought fit to place on record. But in the interests of poor inventors, on whom the Act was intended to confer an especial benefit, and to whom Mr. Aston's guidance and counsel would have been of material assistance, we should have preferred to have seen such guidance and counsel put forth in pamphlet form, easily accessible to all. In that form they would have been a useful adjunct to a copy of the Act, which a thoughtful Government enables the poorest applicant to procure for a very small sum.

The books which Mr. Lawson and Mr. Wallace have produced go deeper into the subject than Mr. Aston's; they are designed on similar lines, professing to give a Digest of practical utility; but as the greater includes the less, it seems to follow that if Mr. Lawson's larger book has succeeded in being complete, Mr. Wallace's small one cannot have reached the same standard; and, further, that if Mr. Lawson's book is itself not complete, the same must be predicated of Mr. Wallace's volume.

Now, we find ourselves unable to consider Mr. Lawson's *Practice* complete; his notes are too slight and drawn too much in outline of a not very accurate kind. We take one of them at random [p. 54], "Foreigners are in all cases subject to the laws of the country in which they happen to be, and if a foreigner while in England infringes a patent, he may be restrained by injunction. But the Court has no jurisdiction to interfere with the property of a foreign Sovereign, &c." In these few lines we find no less than three points open to criticism: first, there is stated in a somewhat bald manner a general rule which has positively no connection with the special rule following it. Secondly, even this special rule is stated in a loose manner; it would be no insult to patent lawyers to explain to those of them who will use this book the why and the wherefore of Injunctions against foreigners: the learned author is no doubt well acquainted with them, but we would remind him that "infringement of a patent while in England" is not the *raison d'être* of the grant of the Injunction: in subsequent editions, if Mr. Lawson preserves his notes in their existing shape, we would suggest an amendment in this sentence by deleting "if," and "infringes a patent, he:" the language may then be applied by author or reader to cases in Patent law which necessitate an Injunction. The third point to which we take exception is the statement of a broad proposition, and rather a startling one, which may be true, but which is certainly not warranted by *Vavasseur v. Krupp*.

We gladly accord our praise to Mr. Lawson for the clearness with which his Index is printed.

Voters and their Registration. By JOHN JAMES HEATH SAINT, B.A., Barrister-at-Law, Recorder of Leicester. Butterworths. 1885.

Here is another of our already numerous handy books. Mr. Saint's Manual of the Law of Registration contains the Election Acts of 1884 and 1885, "with Notes and Index." The former are the works of our wise legislators, and do not here call for remarks at our hands: the latter are the works of our author, and they cannot, we think, have occupied much of his spare time, the Index being probably the part which made the heaviest demands upon it. In his Introductory Notice the learned author says he "does not profess to give the law of the Franchise and

Registration in its entirety." It would be useless, therefore, to look for that law, in its entirety, in Mr. Saint's pages. His book has certainly the merit of being exactly what it professes to be; seldom indeed has a book so faithfully fulfilled its author's prefatory promises.

A Treatise on the Law of Easements. By JOHN LEYBOURN GODDARD, M.A., LL.B., Barrister-at-Law. Third Edition. Stevens and Sons. 1884.

Mr. Goddard's book is a standard one, and our welcome to the third edition is sincerely cordial. The present Treatise is so well-known that it would be superfluous to point out its great merits: the style is so easy that it is a pleasure to read it; but the pleasure we have found in perusing it has led us to enquire somewhat deeply into the store of learning provided for us, and we have stumbled on a few slight defects, two of which we think it well to indicate. In the first place, Mr. Goddard, in common, we regret to say, with too many authors of the present day, has treated his subject too much as a special one, forgetting that it is a branch only of the Common Law, and that many of the principles which he has to notice do not belong solely to the Law of Easements, but are common to that law and to all other branches of the Common Law. This defect is especially noticeable when he is dealing with the rights which are involved in Easements, with the cause of action for violation of those rights, and Law of Torts, and in some cases of the Law of Contracts, their with the compensating damages. These questions are part of the position in the Law of Easements being only special instances illustrative of general principles. The second point we have to notice is a concrete example of this point. If any branch of English Law deserves the name of an occult science it is that part of it which considers the right of action consequent on Disturbances of Easements. But it is only so because lawyers, even on the Bench, refuse to enquire into general principles. In a scientific Treatise, such as Mr. Goddard's, we expect, for example, out of five references to *Wood v. Ledbetter* to find in one of them some sound exposition of that difficult feature of it which assumes (it is but an assumption, even in the elaborate judgments in the case) that the principles of Contract are overridden by the principles of License. This may be the law, but to say the least, it is curious law, and

sooner or later the question will have to be tackled. In the same way, Mr. Goddard leaves the difficult cases which deal with the actions by licensees against strangers who have obstructed them in the exercise of their rights to take care of themselves. Some are not even noticed. We trust these defects will be absent from the fourth edition, and that we shall have the pleasure of being among the first to welcome the new *Goddard on Easements* without any of our present reservations.

The Code of Evidence introduced into the Assembly at the Session of 1885, being the Fourth part of the Code of Civil Procedure, reported complete by the Practice Commission in 1850, with Notes and References by CHARLES D. BAKER, of the Corning Bar. New York: Martin B. Brown. 1885.

This little book, its preface informs us, is a reprint, with the changes necessary to make it conform to the existing law of Evidence, of Part IV. of the Draft Code of Civil Procedure for the State of New York. So long ago as 1848, the Bill codifying the Procedure of the Courts passed into Law; but the Code of Evidence, reported by the Practice Commission two years later, has encountered such persistent hostility that it is still waiting for Legislative sanction.

It may fairly be assumed that few, if any, can be found now-a-days who will question the utility of casting into a clear and concise form the rules governing the practice of the Courts in the reception and rejection of Evidence. The ground of opposition to the Code under review must therefore, we should suppose, lie in some other direction. In seeking for the causes of this opposition—assuming them, for argument's sake, to be well founded—we are naturally led to enquire whether they appear to arise from defects in the arrangement of the subject-matter, or in the phraseology employed, or from the introduction of what may be deemed to be unnecessary innovations in the existing law. As regards the distribution of the subject-matter and the mode of expression adopted, even a foreigner may be permitted to form an estimate; and concerning these two points—the essentials of every useful Digest or Code—we have certain suggestions to make, which it may not be unserviceable to the cause of Codification for us to offer while the Draft remains under consideration.

The arrangement of the Preliminary Sections seems to us to fall short of the scientific standard of a Code, definitions and classifications of the subject-matter being mixed up somewhat indiscriminately. For instance, Sections 2 and 3 are definitions pure and simple; section 5 is in reality a continuation of section 3, but is excluded from its proper place by section 4, with which it has no immediate connection. Sections 4, 6, and 7 are cross divisions of the contents of the Code. Sections 8 to 16, again, are definitions of terms mentioned in section 7. Sections 17 and 18 are also definitions, though they are not expressly classified under any of the divisions. Section 19 is purely a table of contents. A more appropriate place for the definitions above referred to might, we think, have been found in the main body of the work, each being relegated to the particular branch of the subject with which it deals.

In any work claiming to crystallise the Law as it exists, or as Parliament intends it to be, it is not unreasonable to look for language as simple, direct, and concise as human intelligence and ingenuity can devise. Applying the test of simplicity and directness, as well as conciseness of language—a test by no means too rigorous—to the present Draft Code we think that it will stand in need of some revision before it can be said to have reached such a standard. Referring again to section 3, we learn that “Proof is the effect of evidence, the establishment of a fact by evidence.” This section is in reality the juxtaposition of two definitions, the first of which is unfortunately vague and misleading. The *effect* of evidence is obviously not *proof*, but the weight which is to be attached to the different kinds and degrees thereof—a matter which is dealt with by section 194. The amount of proof which the law requires is treated of in section 5: “Moral certainty only is required,” we are there told, “or that degree of proof which produces conviction in an unprejudiced mind.” In the same strain, section 14 speaks of “satisfactory evidence” as that which “ordinarily produces moral certainty or conviction in an unprejudiced mind.” This, no doubt, reproduces in unartificial language the rule in Criminal cases, but it does not equally apply to Civil proceedings, as in them the party who adduces preponderating evidence is entitled to the verdict. Section 10 defines *direct* evidence as “that which proves the fact in dispute directly, without an inference or presumption, and which, in itself, if true, conclusively establishes that fact.” It may be

remarked in passing that to find out what inferences and presumptions are, we must pass to sections 116—122, but we are now chiefly concerned with the definition. May not direct evidence tend to prove a fact without doing so conclusively? The same observation applies to the following section. Section 16 furnishes, as an illustration of conclusive or unanswerable evidence, the record of a Court of competent jurisdiction, which cannot be contradicted by the parties to it. This is further supplemented by section 134, of which subsection 4 renders a judgment or order of Court conclusive, when so declared by this Code. The combined effect of these provisions seems to be that a judgment of a Court of competent jurisdiction is unimpeachable by the parties to it, but what constitutes a Court of competent jurisdiction, and how, and by whom its competency is established, we do not clearly see stated in the pages of the Draft Code. Other instances might be adduced, but enough has been said, we think, to draw attention to certain points in which the Draft Code needs revision before being finally accepted by the American Legislature. The remarks now offered we are sure that the promoters of the Code will accept in the spirit of friendliness towards the cause of Codification in which we offer them.

To ascertain with any approach to accuracy whether the proposed Code introduces unwonted changes in the existing Law would entail, at the very least, a minute examination on our part of the authorities so industriously collected by the annotator, Mr. Baker. Not only however, would the space for making known the results of such an investigation far exceed the limits which could at present be assigned to it, but such a discussion is better suited to the American than to the English legal critic. Under these circumstances, we do not feel it incumbent upon us to undertake so extensive an enquiry, but must leave it to our transatlantic *confrères*, with the full assurance that they are amply qualified to enter upon this wider field of criticism and analysis. We have long watched the battle of Codification in the State of New York, and we have ourselves from time to time noticed both the objections taken by the Committee of the Bar Association of that State, and the replies which Mr. Dudley Field, Mr. Roger Foster, and others, have made to those objections. We sincerely wish for such an issue to the battle as may result in the advancement of the greatest good of the greatest number in the State of New York.

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I.—THE JUDICATURE ACTS AND THE ADMINISTRATION OF JUSTICE IN ENGLAND.

THE Judicature Acts having been fully ten years in operation, a sufficient time has elapsed for estimating their effects, and for suggesting alterations and amendments.

On the whole, the Acts will, I think, be generally acknowledged to have effected considerable improvements in the administration of Civil justice in England. Pleadings have been simplified by the excision of a mass of technical verbiage; time and expense have been saved to litigants by the new procedure; and litigations are brought to an end sooner than under the old system. Much, however, yet remains to be done towards simplification, celerity, and economy.

At present, in the Chancery Division of the High Court of Justice, the Judges are overwhelmed with work. This Division now consists of four Judges, and the work goes on increasing every year. Since the passing of the Judicature Acts, the work of the Chancery Division has been enormously increased, and the probability is that it will be still further increased. The great cause of this is that, while formerly the evidence in the Chancery Courts was taken on sworn Affidavits, or on Issues tried by the Common Law Courts, the time of the Chancery Judge is, to a considerable extent, spent in hearing evidence in open court, and writing it down in court for the benefit of himself, or of himself and a jury. During the sittings of the High Court, the Chancery

Judges are engaged, for several days every week, in hearing or trying causes with or without Juries. To this practice no reasonable objection can be made. The truth is that the Judge, in every case, as far as possible, should have the evidence, in all the material stages of a cause, laid before him in his personal presence, *vivâ voce*, and not, as was invariably the case under the old rules, on sworn Affidavits. But, that the present work in the Chancery Division requires increased Judicial power is held by all those best qualified to give an opinion on the subject.

In the Report, dated 7th August, 1885, of the Commissioners appointed to inquire into the Rules as to the Procedure and Business of the Chancery Division of the High Court, an additional Judge of the Chancery Division is recommended. No such additional Judge has been appointed. By the resolutions contained in this Report, an improvement, much needed, is contemplated as to Administration suits. It is to be hoped that Administration suits in the Chancery Division will be greatly simplified in procedure; and that a great many applications in such cases will be rendered useless. As a rule, in an English Administration suit, the Trustees cannot, or will not, do anything in it without the sanction of the Judge or the Chief Clerk. In Scotland, on the other hand, Trustees wind up all estates under their charge, and never apply to the Court of Session until real difficulties arise in regard to the administration or division of the Trust estate. The Scotch practice is as effective as the English in carrying out the proper ends of Administration, and is very much more economical than the English. No wonder that the late Mr. Orr-Ewing's Trustees objected to allow their duties to be undertaken under the sanction of the Court of Chancery in England.

Lately, a practice has sprung up in the Chancery Division for the Judge to close his court, and betake himself to

chambers. This practice is to be deprecated; and, if necessary, abolished. As a rule, the administration of Justice in a free country ought to be in public, and in the full light of day. What is fit for chambers ought to be done by a subordinate Judge, a Clerk, or a Master, acting, unless in purely formal matters, in the name and under the direct and express orders of the Judge. But, in the Return of 1885 on the Chancery Division, the clearest evidence is given that, in Administration suits, the Chief Clerks in Chancery frequently exercise Judicial functions, and give their opinions, which have the effect of decisions, subject to appeal, on the Bills which come before them. The Chief Clerks have no right to exercise such powers; and they should be prevented from exercising such Judicial functions in the future.

In the Chancery Division, there is a rule which appears to me greatly to be admired as highly conducive to the right administration of Justice. It is that, generally speaking, a cause, from its first inception to Judgment, comes before one and the same Judge. This practice saves a vast amount of public time; for it excludes the necessity of explaining the state of the cause to the different Judges before whom a cause is brought in the Common Law Division in its course from inception to Judgment. The adoption of the same practice in the Common Law Division would effect an immense improvement in the administration of Civil justice in this country. Some day, and perhaps before long, we shall see the practice of the Chancery Division in this respect adopted by the Common Law Division. To this point I shall revert at a later stage of this article.

Another rule of the Chancery Division is worthy of imitation by the Common Law Division. It is that by which the Appeal from the Equity Judge is made to the Court of Appeal in Chancery, and not to a Divisional Court, and

thence to the House of Lords. Why there should be one Appeal less in the Chancery Division than in the Common Law Division might, unless as a fact, be a puzzle to most people. This is another anomaly which ought to be abolished, and to which I shall again refer subsequently.

In the Common Law Division, there is great need of a thorough change in the course of a suit from inception to Judgment. Theoretically, and in the simplest form and through the stages of a Common Law suit, we have the Writ, the Statement of Claim, the Statement of Defence, the Trial, the Verdict, and the Judgment. In some cases, as in actions on Bills, we may have merely the Writ and the Judgment; and in other cases of great simplicity, we may have merely the Writ, the Trial, the Verdict, and the Judgment. But, in all these simple cases, there is, in reality, little or no litigation, and they might, for all practical purposes, be looked upon as undefended actions. As a matter of fact, and of daily practice, there are numerous Interlocutory proceedings of an expensive and dilatory nature in all fully litigated cases. For example, the Statement of Claim is often amended, and so is the Statement of Defence; interrogatories are submitted, objected to, rejected and amended; applications are made for production of documents, objected to, rejected and amended; and all these proceedings are subject to the orders of the Masters in chambers, of the Judges in chambers, of the Divisional Court, of the Court of Appeal, and of the House of Lords. From these proceedings, great expense and delay and waste of judicial power have arisen. In fact, in a fully litigated cause in the Common Law Division, there are numerous opportunities for useless delay and expense. For example, Interrogatories are generally useless when the cause is to be tried before a Judge and a Jury, or before a Judge without a Jury; and the process for the production of documents in a cause might be greatly simplified. Thus,

in the latter case, the practice in the Supreme Court of Scotland might be followed with advantage. That practice is to compel the plaintiffs and defendants to lodge with the officials of the Court all the documents upon which they rely; to allow the parties to borrow the documents for a reasonable time; to compel the parties, if necessary, to return these documents to the officials of the Court; and, lastly, to return all such documents to the parties at the end of the litigation. This would be a considerable innovation on English practice. But it would greatly advance the interests of Justice, lessen expense, and promote expedition in the administration of Justice in this country. In England, litigation is looked upon more in the light of a battle to be won by the most cunning or the richest, rather than, as it ought to be, as a process by which the just rights of parties should economically and fairly be decided according to law.

Now, no doubt, the Judge has control over the mode of trial, and can decide in favour of a Trial by Jury, or without a Jury, or in favour of a Reference to Arbitration, and so on. But the trial of an action by a Jury is needlessly lengthened by the want of a specific determination of the points in dispute as a preliminary to a Jury Trial. Litigants should therefore be compelled, as soon as the Pleadings between them are concluded, to arrange and settle Issues for trial, with the approval of the Judge, previously to the cause being set down for trial. I would even go so far as to urge that, as in the Supreme Court of Scotland, a motion should, as a preliminary in every case, be made before a Judge, for directions as to the mode of trial, and, when required, the settlement of Issues for a Jury Trial. When no such trial was necessary, the Judge should give his decision on the Pleadings and proofs laid before him. Now that a Judge can decide for or against a Jury Trial, and now that the Judge at a Jury Trial, and a Divisional Court by way of

Appeal, and the Court of Appeal, and the House of Lords, also by way of Appeal, may set aside the verdict of a Jury, and give what Judgment is thought best and according to law, the Trial by Jury of the olden times has been virtually abrogated, and the sooner it is decently interred in most Civil cases, as a rule, the better will be our administration of Justice. The important matters now brought before the Civil Courts, and especially Commercial matters, are far too intricate and abstruse for the best Juries which are generally available for such cases, either in London or the Provinces. The public and the practitioners in the Courts are clearly showing their inclinations by rapidly increasing the number of causes now tried before a Judge only, and not before a Judge and Jury, and which would formerly, and even lately, have been tried by a Judge and Jury.

I wish now to revert to the unnecessarily large number of Appeals in the Common Law Division. In matters of Procedure there may be four Appeals instead of three, as in the Chancery Division; and on final Judgment there may be three instead of four Appeals in the latter Division. Thus matters of Procedure come, first of all, before a Master, then there may be an Appeal to a Judge in Chambers, and another to a Divisional Court, and another to a Court of Appeal, and yet another to the House of Lords. Now, such a number of Appeals is clearly unnecessary; and, on the score of expense, most objectionable. I venture to assert that the cases before the Chancery Division are of more importance, and of greater intricacy, as a rule, than the cases coming before the Common Law Division. Why, then, this difference and excess of Appeals? For such a multiplicity of Appeals there is not, and there cannot be, any rational defence given. Accident and custom can alone explain the existing practice. I would, therefore, suggest that the Common Law Masters should be deprived of their quasi-Judicial powers, and that the Common Law

Divisional Courts should be eliminated from our Civil Procedure. In a word, the practice of the Chancery Division should, as regards the number of Appeals from the Judges, be considered the correct number in theory as well as in practice. Further, neither the Masters in the Common Law Division nor the Chief Clerks in the Chancery Division should, unless in purely formal matters, have anything to do in the way of exercising Judicial functions. I hold that Masters and Chief Clerks, unless as Delegates, should be restricted in their legal Court duties to matters of procedure and taxation of Solicitors' Bills. Where they act, they should take the matters which are brought before them in their order, and not by way of special appointments, and should finish one Motion, Enquiry, or Taxation, before commencing another.

As, no doubt, the work of the two existing Appeal Courts would be increased by the adoption of the proposal here made, I would further suggest that a third Court of Appeal should be established; that its ordinary President should be the Lord Chief Justice of England; and that it should consist of his Lordship and two Judges in ordinary to be called Lords Justices in Appeal. Very probably a fourth Court of Appeal would require to sit permanently, and, at least, occasionally.

Two observations here occur to me as to the constitution of the Courts of Appeal, and as to the distribution of work by the existing rules of rotation. Except the Chiefs or Presidents of the Courts of Appeal, all the Judges of the High Court of Justice should be appointed Judges of First Instance, and should gradually, as vacancies occur, be moved up to and into the High Courts of Appeal. Instead of the work being distributed by rotation amongst the Judges of First Instance in the High Court of Justice, every plaintiff ought to have the right to go before any Judge he selects, and the Chief Justice, or the Lord Chancellor,

should have the right of making any necessary redistribution.

An important and essential feature in every well-developed Judicial system is, that the causes, from first to last, should come before one and the same Judge. When this rule is adopted and carried out, a host of applications and explanations is avoided, and rendered useless and impossible. This is a good feature in the Courts of the Chancery Division, and its absence in those of the Common Law Division is much to be deplored. How to engraft this practice on the latter has often been considered by many able and experienced Jurists. Doubtless the existing system of Assizes in the Provinces is an obstacle to its adoption. Still, if all causes were marked as before a certain Judge, as in the Chancery Division, a great saving of time and expense would be effected. The Assizes alone create the obstacles now existing for the perfect application, development, and working of the Chancery practice in this respect. At the very most, cases would be stopped by the Assizes, and even a tentative system and rough attempt to bring all matters in a cause before one and the same Judge would, if adopted and enforced as a general rule, be a great improvement on the existing practice. This system might even be modified so as to bring all matters, up to the conclusion of the Pleadings, before one and the same Judge, and then to have the trial, with or without a Jury, before the same or another Judge; and in every case, if at all possible, before the same Judge.

Hereafter, I expect we shall have a considerable modification of our Judicial system by a re-organisation and re-arrangement of Circuits, or by the localisation of Judges of the Supreme Court in the great provincial centres, or by the extension of the jurisdiction of the County and other Inferior Courts in London and the Provinces to all matters of Civil contract, and independent of the

amount involved. Perhaps, we are not far from the time when, for example, the Recorders of London, Liverpool, Manchester, Newcastle, Leeds, Bradford, shall exercise Civil jurisdiction in all matters of Civil contract, and independently of the amount involved ; or it may be that the County Courts will be more closely knit to the Supreme Court, and that the former will have a Civil jurisdiction conferred upon them almost co-extensive with that of the Supreme Court ; or, again, that Judges of the Supreme Court shall be locally and permanently settled in the great provincial towns and cities of England. Without disparaging the services of the able Provincial Registrars of the Supreme Court, I am not at all inclined to think that they ought to be dealt with in any way different from that in which the Masters of the Common Law Division and the Chief Clerks of the Chancery Division ought to be dealt with. Judicial work should be done by Judges and by Judges alone, and not by officials who have no Judicial responsibility.

In the re-organisation of the County or Provincial Judicatures I look for the best, most effective, and most economical mode of a wise reformation of our Judicial system. A dread of additional expenditure, and a piece-meal mode of reform have given us what was long, till lately, one of the worst Judicial systems in the world. What are the facts ?

The Judges in the High Court of Justice are all men of the highest integrity, honour, learning and industry, and further, as a rule, the Provincial Judges are possessed of the same high and admirable qualities. Whatever diverse opinions may be held in regard to the learning and industry of our Judges, no difference of opinion exists as to their integrity and honour. Yet the administration of Justice in England is tedious, uncertain, and expensive in a higher degree than in almost any country in the world,

and it is certainly distinguished for these bad qualities in a higher degree than Scotland. When, for example, has any case been decided in England, as a case has been in Scotland, in the Supreme Court of that country, and thereafter decided finally by Appeal to the House of Lords, within one and the same year? I venture to assert that no English case, under the most favourable circumstances, could be so decided within double the time. Uncertainty as regards the result of a litigation need hardly ever, if at all, occur in a well-defined system of legal administration; and yet how frequently English cases are decided upon points which none of the litigants ever imagined. The rules of the English Law are themselves not uncertain, but the rules of Procedure are full of pitfalls, and parties go to proof on Pleadings which are frequently most uncertain and undefined. In Scotland, the uncertainties to which I have referred are eliminated before trial, and the parties know before the day of the trial what they have to prove, and they have often the advantage of getting their case decided by an experienced Judge, without being at the great expense incident to a Jury Trial. Moreover, the indefiniteness of the issue between the parties at a Jury Trial in England, and even at a Trial before a Judge, has greatly tended to a shameless abuse and waste of public time, by the admission of unimportant and irrelevant matter at the trial. Some recent Jury Trials in England have caused a shameful waste of the public time of the Court; and others have become abortive by the perversity of one Jurymen disagreeing with his eleven colleagues. Surely these two misfortunes ought to be prevented in future.

As regards the relative expense of the English and Scotch systems, I do not propose to enter into a detailed comparison. But after a considerable amount of personal experience, and a careful observation of the working of the two systems, and more especially of the invariable practice

in Scotland, not only in the Inferior, but also in the Superior Civil Courts, of having the same Judge in almost every cause, in all the stages of a cause from its commencement up to Judgment, and also of the exclusion of all quasi-Judicial authority, I have no hesitation in saying that the Scotch system is very considerably less expensive than the English.

Be the expense what it may, it is undeniable that the present Courts of England cannot adequately, efficiently, and speedily, dispose of the work which comes before them. The problem, therefore, which has to be solved is, how can the administration of Justice in this country be wisely, efficiently, and also economically reformed ?

Now, there cannot be the slightest doubt that, in England, many cases brought before the High Court of Justice in the Chancery and Common Law Divisions, and especially in the Common Law Division, never go beyond the issue of the Writs ; or, at the farthest, beyond the Pleadings, and certainly are never tried, or even set down for trial. These cases are chiefly for payment of outstanding accounts, and for causes of action of the simplest nature, and are often for small amounts, and for insignificant causes of action. These are settled out of Court, because there are really no defences to the actions, or because delay, which is the main object sought to be attained by resisting the claims made, has been obtained. For all such actions, no public reason exists for their being brought in the High Court of Justice. Any Judicial tribunal is, on public grounds, quite sufficient to deal with them. I would even go so far as to suggest that all actions of Contract and Tort, without restriction as to the amount claimed, should be capable of being instituted, conducted, and decided in the County Court. Of course, parties whose claims exceed a certain amount, say £100, might have power to commence legal proceedings in the High Court of Justice ; but should be subjected to partial pecuniary loss in regard to the costs recoverable against

defendants, in the event of their not recovering the minimum sum in the High Court.

The fundamental principle of a good administration of Justice is, that it should be easily accessible to the litigants, and that it should be local, in fact at the very doors of the citizens. That people in the great English cities and towns which, in many instances, are as populous as London was when the Supreme Courts of England were first fixed at Westminster, should be obliged, in nearly every case, to institute legal proceedings in the High Court of Justice for all sums exceeding £50, is perfectly ridiculous. True, there are some exceptions as to intestate estates, and also some facilities, recently afforded, for the institution and prosecution of legal proceedings in the Provinces before and in the presence of the District Registrars of the Supreme Court. But these facilities, and these exceptions, are simply examples of the parsimonious economy of the Legislature, providing, in an inadequate manner, for the due administration of Justice in this country. They are merely makeshifts and substitutes for a rational system of administering Law. In France, all Civil cases are first begun, prosecuted, and decided in Provincial or Inferior Courts.

The solutions which I would venture to propose, would be the abolition of the District Registries of the Supreme Court; the extension of the Jurisdiction of the County Courts to all ordinary Civil actions; the entire assimilation of the procedure in the County Courts to that of the High Court of Justice; the right of appeal at any stage of the suit from the County Court Judge to the Court of Appeal; and a power vested in the Court of Appeal to remit cases back to the County Court, or to order them to be prosecuted before a Judge Ordinary of the High Court, or to give judgment, or to make such order as seemed just. For this sweeping alteration, the only objection which

can be alleged is, that the Judges of the County Courts are not qualified to perform the duties here proposed to be assigned to them. My answers to this objection are:— (1) most of them are perfectly well qualified; (2) those who are not should be asked to resign; and (3) men able to perform the duties ought to be appointed. To increase the number of the Judges of the Supreme Court is neither desirable nor necessary; because the duties to be performed can, most conveniently for the people, be discharged by Judges of the rank of the County Courts, and also most economically for the national exchequer, and the pockets of the litigants. In the High Court of Justice, there will always be higher fees paid to Solicitors and Counsel than in the County Courts; and also higher salaries to Judges in the former than in the latter; and I have no hesitation in asserting that there is no compensation to the public for the increased expenditure. In order to diminish expense, while not diminishing the efficiency of the County Courts, I think the time has arrived for disallowing Counsel's fees in all County Court cases, and simply allowing Solicitor's fees against the unsuccessful litigant. In Scotland, before the Sheriffs, or County Court Judges, who have unrestricted Jurisdiction in all Civil actions of Tort and Contract, no Counsel's fees are allowed for written Pleadings, or trials, or arguments; and the whole of the proceedings from first to last are conducted by the provincial Solicitors. Whatever the English Solicitors may have been before I had personal experience of them, I have no hesitation in asserting that, in knowledge of business, and of Law, they are not now inferior to their brethren across the border. That a Scotch Solicitor should ask the advice of Counsel on his cases in the County Court is almost unknown. A Scotch Counsel in the Police Court, or in the County Court, is a *rara avis*; and, unless specially retained for some rare and delicate case, never enters an Inferior Court as a practitioner. There is

no necessity for giving English Solicitors the right of exclusive audience in the English Inferior Courts; but there is a great necessity for restricting the costs which are now enforced against unfortunate litigants in those Courts. Every person ought to have the right to employ or retain any capable legal agent or substitute he pleases in his legal business; but no one ought to have the right to compel his adversary to pay for his adversary's pleasure.

The costs in the Inferior Civil Courts in England ought to be largely reduced. Comparing similar cases, *i.e.*, where the claims do not exceed £50, and are tried summarily, and without any Pleadings whatever in Scotland, costs are from ten to twenty times higher in England than they are in Scotland, and no small portion of these costs is paid to the officers of the English Courts: *e.g.*, the County Court fees in England are outrageously high. In a recent English County Court case which came under my notice, the claim was on a simple contract debt for less than £11, and the Court fees for issuing the writ were 14s., and the Hearing fee for a Jury Trial amounted to 22s. Besides these fees, there were the Solicitor's charges for taking down the evidence of the witnesses, preparing a brief for Counsel, and a fee to Counsel. In Scotland the whole of the plaintiff's costs, including all Court fees, could not possibly, in such a case, have been more than 5s. or 10s. As a matter of fact, the fees of the Court, under the Act of 1 Vict., cap. 41, section 32, would have been 3s. 1d.; that is to say, for summons, 1s.; for copy for service, 6d.; for entering in Procedure Book, 6d.; and for Court Crier's fee 1d., and 1s. for extracting the Decree. Had the sum claimed been £50, the Court fees would not have amounted to more than 4s. 1d., which would have included 2s. for the summons [*vide* Debts Recovery Act (Scotland), 30 & 31 Vict., c. 96]. To have had counsel in such a case as I have mentioned, and which

is typical of what happens frequently in England, would have been treated as ludicrous by a Scotch Judge or a Scotch audience.

In Scotland, the parties, or their Solicitors and Agents, order service to be made and execution of final Judgment to be effected by an officer of the Court ; and the Court has nothing to do with the matter, unless in issuing the Summons in terms of the Claim made ; in authorising, where asked, arrestment, on the dependence of the action, and before final Judgment ; in hearing and deciding on the Claim ; and in issuing the process of the Court to enforce Judgment. The functions of the English County Court Bailiffs, and the process of entering Judgment do not exist in Scotland, as they do in England. From the Judgment of the localised Judge (called the Sheriff-Substitute) of the Sheriff Courts in Scotland, in all actions where the amount at issue exceeds £50, and in which there are regular and formal pleadings, an appeal lies to the Sheriff-Principal, who is a member of the Faculty of Advocates, and is allowed to practise before the Supreme Court in Edinburgh ; and from the Sheriff Principal to a Judge Ordinary of the Supreme Court, or to the First or Second Division of that Court. In all actions where the claim does not exceed £50, and which have not been remitted by the Sheriff-Substitute from his Summary Small Debt Court to his Ordinary Civil Court, appeals may be taken in certain cases and circumstances of law and fact to the Sheriff-Principal, whose decision is final. Such appeals are almost unknown in Scotland. The Sheriff-Substitute is almost invariably a member of the Faculty of Advocates in Edinburgh, and exercises Civil and Criminal Jurisdiction within a certain District in a county or counties, and discharges his duties, Civil and Criminal, summarily, and without Pleadings, and also formally, with regular Pleadings. Briefly, he discharges the duties of an

English County Court Judge, with a more extensive Civil Jurisdiction, and also of an English City Recorder, with a less extensive Criminal jurisdiction. This division of summary and formal procedure is of the greatest advantage to litigants, and is worthy of adoption in any extension of the Jurisdiction of the English County Court Judges. In some respects, considerable advantages would arise from the combination of the duties of an English County Court Judge and of an English City Recorder ; but they are so unlikely to be realised that, for the present, I do not trouble myself with their discussion. I wish to keep myself within the limits of the attainable, and prefer to consider the best mode of utilising the valuable services of the English City Recorders rather than their abolition.

As there are many trifling Civil causes instituted in the High Court, and tried in London, or at the Assizes in the country, so there are numerous trifling Criminal actions brought, at the Assizes, before the Judges of the High Court. The number of those cases has been greatly increased of late since the number of the Assizes in the course of a year has been increased, and since the Commission to the Judges of Assize as to clearing the gaols of all untried prisoners has been enforced. That prisoners should be long kept in gaol awaiting their trial is intolerable. But, surely, arrangements ought to be made by which the Judges of the High Court might be saved the necessity of trying cases of theft and assault of the most trumpery kind. One way, and that the simplest, would be for the City Recorders, or Justices of Quarter Sessions, to hold sittings and clear the gaols of all prisoners who were subject to their jurisdiction, before the Assize Judges entered upon their duties. Another way of settling this matter would be to appoint Commissioners to aid the Assize Judges in the execution of their Civil and Criminal Jurisdiction, and relegate the less important cases to the Commissioners. A

third way, and that, as it seems to the writer, the best of all, would be to induce, and, if necessary, compel the Recorders and Justices of Quarter Sessions to hold monthly sessions for clearing the gaols, and to restrict the Criminal Jurisdiction of the Assize Judges to the most serious crimes, *e.g.*, treason, murder, manslaughter, rape, perjury, and the like, which, for their gravity, enormity, or public consequence, ought to be tried by the most experienced and exalted Judges of the Kingdom. To take depositions, write out briefs for counsel, summon witnesses, who may be detained several days, to attend the Assizes in a case of petty larceny, where the property stolen may not amount to more than a few pence, and the punishment be only a few days or hours of imprisonment, is a gross perversion of the uses of the Assize Courts, a shameful waste of the public time of high State officials, a disgraceful squandering of public money, and an outrageous waste of the time of private individuals. Most, if not all of the City Recorders, who have much Criminal work to do, are amply remunerated for their labours; and those Recorders who are not so remunerated might have their salaries increased to meet their increased trouble and expenses. Certainly the additional cost which would thus be incurred in cities and in country districts would not be a tithe of the expense incurred by the present wasteful and useless expenditure now incurred in the Quarter Sessions cases.

I should not be at all sorry, as a rule, to see the advocacy in all the Inferior Courts, Civil and Criminal, in England—nay, further, I would urge that this work should be—wholly done by Solicitors, and not, as a rule, as at present, by members of the Four Inns of Court. Some may think this observation rather hard in a pecuniary sense upon the junior members of the Bar, and, if carried into execution, as tending to close a training school for the higher walks in the Profession. But I have long thought that not a few men in this country would have been saved a life-long cause of

regret had some of them not been encouraged by Sessions sops and County Court briefs to waste their time and their money in the vain hope of success in a profession which requires very high powers of mind and body, or very powerful legal influences and connections to gain anything like success within the limits of an ordinary lifetime. Besides, the administration of Law ought to be conducted on public and national grounds, and not on private or class grounds.

Still further, learned Counsel practising in the Inferior Courts, and instructed by Solicitors are expensive and unnecessary, and ought to be abolished. If a man is content with practice in the Inferior Courts of England, and if he gets nothing else, he would, as a matter of fact, be more in his proper place as a Solicitor than as a Counsel. Whether this be so or not, the day is not far distant when the claims of the Solicitors to a partial or unlimited right of audience in the High Court will be seriously considered by our Democratic Age. Notwithstanding the large number of English Counsel in the House of Commons, Parliament is not likely to uphold the present rights of the members of the Four Inns of Court against the strong and organised association of the Incorporated Law Society, and against the public interests and public economy. In Scotland, the Solicitors have a practical monopoly of the Criminal practice in the Town and City Police Courts, and in the Sheriff or County Civil and Criminal Courts. In these Police Courts, the Public Prosecutor is usually the Superintendent of Police, and the Assessor of the Court is a Solicitor, and the Agents of the Prisoners, when defended, are Solicitors. Further, in the Sheriff Criminal Courts, the Public Prosecutor, called the Procurator Fiscal, is a Solicitor, except, so far as I know, in one single instance, namely, in Glasgow; and the Agents of the Prisoners charged before the Sheriff Courts, when defended, are Solicitors. Under the present regulations as

to costs, the English Solicitors are, as a rule, better paid, and incur no personal responsibility by employing Counsel in the Inferior Courts than by attending themselves.

The last point to which I can here refer is the rearrangement of the Circuits, upon which there is a great waste of Judicial strength. The work now done on Circuit is much less important in character and amount than it was in the days before the rapid travelling and means of communication of the present time, and it is year by year becoming more and more insignificant. Where great interests are involved, and where these are brought before the High Court of Justice, and are not referred to Arbitrators, cases are sent to the High Court in London, and are there instituted, conducted, and brought forward to final Judgment. Very rarely are there now any important causes tried on Circuit. If the proposals which I have here made should, in any considerable degree, be adopted, the Judges of the High Court would have little to do on Circuit, and they would be able to do that little in a very short time.

I do not advocate the entire abolition of Circuits; I merely wish to see the work properly distributed, and economically and efficiently conducted. Let there be concentration and consolidation of Circuits, and let the Assizes be made for important work and vital interests, and I believe ample justice would be done to all parties, and a great economy of Judicial power effected.

This is not the place to draw up a scheme of concentration and consolidation. Such a scheme ought to be drawn up by the Council of Judges, and should rigidly adhere to the necessities of each place, and should pay no attention to the clamour of interested sections of the community. Assizes are for the administration of Justice in the most important worldly affairs of men, and are not for a pageant, or show. What is most certain is that the Assize Judges on the Northern Circuit should not have their time so wasted by

improper arrangements as to have, as happened last year, nearly a week longer at Manchester and Liverpool than was required : or, as in previous Assizes, the time wasted by trivial cases, both in the Civil and Criminal Courts. Properly to fit the Judicial power to the work to be done is no easy matter ; but, for a long time, the arrangements throughout England could scarcely have been more injudicious.

I think the time has arrived for the abolition of the Grand Jury system in English Criminal Trials. I look upon it as a remnant of an old and primitive system, which is now obsolete.

I should also like to see the abolition of the office of Queen's Counsel, as now constituted, and the substitution of Public Prosecutors in all Criminal Trials and in all Criminal Courts, at the public expense. These points, however, I cannot discuss at the close of the present Article.

A proposal has been made, and even a Bill drawn up, for the appointment of localised Provincial Judges of the Supreme Court, at various great industrial and populous centres. I have not much favour for this proposal. I believe that an extension of the jurisdiction of the County Court, and a higher rate of salary to the County Court Judges in such populous centres than that given in other districts, with an entire assimilation of the practice of the County Court and of the High Court of Justice, and a speedy and economical right of appeal from the County Court to the High Court of Appeal, would meet all our requirements, and give perfect satisfaction to the public. Let the County Courts have full jurisdiction to decide in all every-day matters ; and let this jurisdiction be divided into Summary, for amounts not exceeding £50, and Formal, in all matters of higher amount, or of peculiar intricacy or delicacy in investigation or in point of law, and the County Courts would satisfy the aims of their founders, and would

dispense full and ample Justice, expeditiously and economically, at the doors of the people. By means of appeals to the High Court of Appeal, the Judges of the County Court would be kept in the straight road of Justice, and would be induced—nay more, compelled—to administer Justice according to Law, and not according to a well-intentioned, but unenlightened legal mind. The hopes of advancement to a better place, or to a higher salary, in the Judicial hierarchy, whether in the County Court, or in the High Court of Justice, would stimulate the best men by the hopes of reasonable and proper rewards for greater erudition and industry than are sometimes to be seen on the Bench of the County Courts, which occasionally seems to be the refuge of professional failure or of political interest and subserviency.

I must now close this article, and submit the proposals here made to the candid attention and consideration of all who are interested in the reform of the administration of Justice in England. If I have successfully explained the proposals I desire to submit in this article, my labours will not have been altogether in vain. If I shall have urged forward new legal reforms in the right direction, my object in preparing this article for the *Law Magazine and Review* will have been accomplished. What I have aimed at has been the promotion of despatch, economy, convenience, and certainty, in the administration of Justice in England.

ALEXANDER ROBERTSON.

II.—THE RECENT LITERATURE OF ENGLISH MARITIME LAW.*

THE constant increase in the number and bulk of works on Maritime Law, though calculated to daunt the spirits of aspirants to forensic fame in that branch of Jurisprudence, cannot be wondered at in an Empire whose wealth, far exceeding that pertaining to any previous state or time, rests to so great an extent on the sea, and that which pertains to it. We have within little more than twelve months drawn the attention of our readers to several works on this branch of Law,† and propose at present to confine our remarks to those which stand at the head of this article, and we think that it will be most convenient to deal with them in the order in which they there stand.

Of the new edition of Pritchard's *Digest*, we may say, as we said forty years ago, when the first edition made its appearance, that it is an "admirable compilation" (*Law Review*, Vol. VII., p. 287), but whilst in that respect keeping up the character of the former editions, the present is so much enlarged, and so different, that we may be excused for dwelling at some length upon this new edition. In 1847, though the thunder of the guns of the great war had

* *Pritchard's Digest of Admiralty and Maritime Law*. Third Ed. Edited by the Author and J. C. HANNEN, Barrister-at-Law. Butterworths. 1886. *Arnould's Law of Marine Insurance*. Sixth Ed. Edited by D. MACLACHLAN, Barrister-at-Law. W. Maxwell & Son. 1886. *The Law of Carriage by Sea*. By T. G. CARVER, Barrister-at-Law. Stevens & Sons. 1885.

† Wilson's *Handbook of Shipowners', &c., Liability*. *Law Magazine and Review*, No. 258, p. 100: Tudor's *Leading Cases in Mercantile and Maritime Law*. *Ibid.*, No. 255, p. 223: Smith's *Admiralty Law and Practice*. *Ibid.*, No. 255, p. 236: McArthur's *Marine Insurance*. *Ibid.*, No. 260, p. 307: and the essays on *Contrat à la Grosse*, *Assurances Maritimes et Avaries*, by M. Jacobs, a Belgian advocate. *Ibid.*, No. 262, p. 102.

been hushed for a generation, yet, when the Admiralty Court was mentioned, it conjured up in the minds of those who heard the name, primarily visions of prizes and prize-money, whether from the enemy, or unneutral neutrals, or pirates and slavers, and only in a very secondary degree did anyone think of its ordinary Civil, or, as it was called, Instance Court business. Merchant ships were much fewer in number, steam was only just beginning to hiss, vessels were sailed for safety and not for quick passages, there were comparatively few lights on the coasts, and so vessels kept away from the inhospitable shore, verifying their position by the lead, and not coming dangerously close to pick up lights. Ships had no regulation lights, and very generally only showed a flare-up, or white light, when another vessel's sails or hull were seen approaching, and so the periods in which officers could make mistakes were limited, instead of, as now, being spread over the time it takes them to traverse the five or six miles over which the good mast-head light of a steamer is visible, and from these causes, possibly, both collisions and salvages were rarer. But there was another and far more potent reason in the fact that until a very few years previously, in 1840 (3 & 4 Vict., c. 65, s. 6), the Admiralty Court, in consequence of the jealousy of the Courts of Common Law, had no jurisdiction over cases of collision, or salvage, or even of necessities supplied to a ship, where the accident happened, services were rendered, or goods sold, in the body of a County, and not on the High Seas, and this, of course, at once cut out all river collisions, almost every case of stranding and subsequent salvage, and practically, the whole body of necessities. It is, therefore, not to be wondered at that we find the first edition of the *Admiralty Digest*, though perfectly complete, yet whilst the whole of the text, not counting appendices of Statutes, &c., consists of only some 500 pages, the greater part is directly or indirectly concerned with

Prize Law. When the second edition appeared, in 1865, the cases on Prize Law remained as before, the Russian War having added scarcely anything of importance, except the question as to the position of ships belonging to a protected state when the protecting state is a belligerent (*The Ionian Ships*, 2 Spk. 212; *The Leucade*, 2 Spk. 228), whilst the Declaration attached to the Treaty of Paris in 1856 abolishing Privateering, and enacting that Free Ships made Free Goods, except contraband of war, and that neutral goods, with the same exception, are free even under the enemy's flag, had rendered a great portion of the learned judgments of Lord Stowell obsolete, so far, at all events, as concerned the States which had agreed to the Declaration. On the other hand, not only had numerous cases been decided, and principles determined, under the first Admiralty Court Act of 1840, by Dr. Lushington, who had so worthily presided over the Court during the whole interval, but the second Admiralty Court Act of 1861 (24 Vict., c. 10), had filled up the *lacunae* left in the jurisdiction by the former Act, and in several respects,—notably master's wages and mortgages of ships, and damage done by ships to piers or barges, and damage to cargo in foreign ships,—had still further extended it. Also, in the time which had elapsed, the Merchant Shipping Act of 1854 had been passed, and the important Amending Act of 1862, with the Regulations for preventing Collisions at Sea made under it, had come into operation, and we think the author exercised a wise discretion, under the circumstances, in leaving the Prize Law out altogether, as the Law of the Instance Court alone had already swollen to more than double the size of the first Edition. Now, other 20 years have passed, and the Admiralty Court itself has ceased to exist, swallowed by the Probate, Divorce, and Admiralty Division, which in its turn is one of the *tria juncta in uno* which compose the "High Court of Justice" (ill-omened name!);

its appeals, instead of going to the Queen in Council, go, like all other English appeals, first to the Court of Appeal, then to the House of Lords ; but whilst the exclusive jurisdiction of the old High Court of Admiralty is still confined to this Division of the High Court of Justice, yet, as a Division of that High Court, it can now entertain causes and decide questions which incidentally arise in the course of actions which previous to the Judicature Acts it could not touch ; indeed, last year (1886), the President of the Division gave notice that the Court was open to hear all London Maritime causes which should be heard with a special jury. Habits once formed take a long time to change, especially in Legal matters, but it is not too much to expect, especially whilst the Division retains the services of the two eminent Commercial lawyers who now constitute it, that by degrees the Court will practically draw to itself all the Charter-party and Insurance cases, in addition to its own peculiar work. Possibly anticipating this result, the authors—for we are glad to note on the title page the name of Mr. Hannen in addition to that of the veteran to whom we owe the original work—have now given us a book which, though no doubt it will still be called by the well-known old name, “*Pritchard's Admiralty Digest*,” rather than by the longer title under which it is now published, and which stands at the head of this article, might, without assumption, be entitled an “Universal Digest of Maritime Law, International, Foreign, and Municipal, in time of Peace,” and, as might be expected, a portentous book it is. The text has again more than doubled in bulk from the last edition, and, as shewing the rate of growth, there are, unfortunately but necessarily, nearly 200 pages of Addenda, consisting mainly of cases decided as the work went through the press, and too late for insertion in their place. As a result, we have a book which is a library in itself. Of course we do not advise any practitioner to become a mere digester,

but, with this book on his table, he will know where to go to find the full reports of cases in any branch of Civil Maritime Law in this country, and also what the Foreign Law on cognate matters is, the importance of which to the practitioner in Maritime Law cannot be overrated, as the cases of the *Mary Moxham*, 1 P.D. 43, 107; *The City of Mecca*, 5 P.D. 28, 6 P.D. 106; *The Leon*, 6 P.D. 148; *The Gaetano e Maria*, 7 P.D. 1, 137; *The Leon XIII.*, 8 P.D. 121; and *The Augusta*, just decided in the Court of Appeal,*—in all of which a knowledge of Foreign Maritime Law, Spanish, Portuguese, Italian, or French, was, or would have been for a final decision, essential,—amongst numerous other recent cases, abundantly testify. The authors have gathered their Foreign Law from many sources, including that valuable periodical, the *Journal de Droit International Privé*,† of Paris, and we are glad to notice, amongst others, that of the author of the papers on Foreign Maritime Law now appearing in this *Review*.

We feel sure that Mr. Pritchard will reap a rich harvest from this most valuable book, as no library of Law books can be considered complete without it, and for the practitioner in Maritime Law, whether at home or in our Colonies, or in places where we have Consular or other Courts, it will be the seed and remain the core and nucleus of his collection. We would also point out how much more useful a Digest is, which, like this, collates various sets of

* See the *Times*, 16th February, 1887.

† It could scarcely be expected that a foreign periodical, which only dates from 1885, should have already made a sufficient mark to be quoted in an English Law book published in 1886. But we think it right to draw the attention both of the authors themselves, and also of the student and the practitioner in Maritime Law, to the *Revue Internationale du Droit Maritime*, edited by a member of the Bar of that great Mediterranean seaport, Marseilles, which supplies the cases on Maritime Law as they are decided in the several Continental States, and contains an abstract of legislation on the subject, and papers by jurists in many lands.

Reports, than one which is merely a sort of index to one set. Reporters are but mortal, and their head-notes are liable to errors, but these stand a good chance of being eliminated, or at all events noticed, when several Reports are compared.

Turning to the other books, a new edition of *Arnould on Marine Insurance* is always welcome, and none the less so for being edited yet again by Mr. Maclachlan. It has been said that no history can be at once interesting and impartial, and perhaps that is the reason why Law books, as a rule, are not classed as interesting reading, but here, though the cases and the results of them are stated fairly enough, it is refreshing, even if we do not agree with the sentiment, to hear the vigour with which the editor denounces the assimilation of the Maritime Law of different States, always, be it understood, unless they like to adopt ours. Of course, Mr. Maclachlan is only dealing with the subject of Insurance, but this is what he says on p. 898 :—

“ A question already glanced at has divided in opinion those who are very conversant with the practice of Average Adjustment, and that is, whether the object of an Average sacrifice be immediate safety only, or the ultimate success of the voyage. In this country the former is the rule of practice, and of law ; the other, but a speculative view. On the Continent, however, and in the United States, where there is a disposition to be much more lavish in compensating evils at the joint expense, this latter view, unconsciously perhaps, modifies legislation there to a considerable degree, until it deviates widely from the line of principle followed in this country.

“ The daring spirit of individual enterprise in England has never needed the encouragement of factitious aid and compensatory protection, but the timid spirit, hitherto prevalent over much of the Continent in Maritime affairs, has appealed so successfully to the practice of General Average adjustment, that assimilation to their system in our practice and Law were a thing, though desired by some, to be generally deprecated.”

Mr. Maclachlan adds, in a note, the following remark :—

“ This has been in agitation for some time. England has everything to lose, nothing to gain, by an assimilation, which at best will be imperfect, and even then, at a sacrifice of nearly all those principles now recognised.”

We may indeed find it difficult to see what the “ daring

spirit of individual enterprise " on the part of the merchant has to do with the judgment and discretion of the master, when deciding on the course to be adopted, say, to lighten a ship which has been driven on shore by perils of the seas. One merchant has bullion and another bullets on board ; if the master occupies himself in landing the bullion, and gets it safe to its destination whilst the ship is still ashore, by English law it is not liable to contribute for subsequent efforts which ultimately get the ship off (*Waltham v. Mavrogani*, L.R. 5, Exch. 116). If he keeps the bullion on board and lands the bullets, these latter, indeed, will not contribute, but the bullion will, as it is exposed to the risk. One would say that if, according to the old Rhodian Law, all owners of cargo were consulted, there would be a consensus of opinion on the part of all except the owner of the bullion, that it should be kept on board to the last, if the English Law was to govern the case ; whereas if that of the United States and the Continent prevailed, they would all agree to land the most valuable goods first, so as to secure their contribution as far as possible.

Mr. Machlachlan falls violently foul, at pp. 830-834, of the recent judgment of the Court of Appeal, in the important case of *Stewart v. The Merchants' Marine Assurance Co.* (16 Q.B.D. 619), at which we were the more surprised from his seeming approval of it in his Preface, but we find that he only approves of the judgment in that which is *obiter*, viz., that insurers and assured are foolish to allow 3 per cent. to remain on policies of insurance on ships as the limit beneath which insurers will not pay. The learned editor proposes instead a sliding scale of percentages adjustable to the value of the ship. We cannot help thinking that if an alteration is to be made, it would be simpler and better, in the case of each ship, to put the limit in absolute figures, as is now frequently done in policies on yachts, and not at an amount to be arrived at by calculation.

The decision itself appears reasonable enough. The Master of the Rolls says that it was decided in America by Mr. Justice Story, in 1836, that in the case of a voyage policy on ship—he might have said on ship and on cargo also—(*Donnell v. Columb. Ins. Co.*, 2 Sumner, 366), successive small losses during the voyage might be added to get beyond the 3 per cent. limit, and also in England (*Blackett v. Royal Exch. Ass. Co.*, 2 C. & J., 244), as regards the ship, and though he does not approve of applying the strict rules of legal construction, as was done in that case, to a Mercantile instrument, yet he holds himself bound by a decision which has been acted upon in numberless cases since it was decided in 1833. But the M. R. says that, in effect, he will not carry it further: that such questions ought, as a rule, to be decided by a commercial jury, and have been so in, and since, the time of Lord Mansfield, but that as the parties have dispensed with the services of a jury, the Court have to perform its functions, and that, as a matter of business, he thinks that where the policy is a time policy, the parties never could have meant the total to be carried on from voyage to voyage with different crews and different captains, but to have them adjusted at the end of each voyage, and therefore that in a time policy, separate losses may be added together on each separate voyage, and if they exceed 3 per cent. for any one voyage, they may be recovered from insurers, but that the aggregate of losses on one voyage is not to be carried on to another. We cannot see anything in the judgment which justifies the use of such marginal notes as the following: “Anomalies of the decision;” “What the Court should have done;” “Root of this erroneous decision;” nor for the bitterness of a note (p. 831), which says—

“A printer’s blunder in the judgment makes Lord Esher say that the memorandum was introduced in favour of the *assured*; no doubt he said in favour of the *insurer*; but the blunder neatly expresses the outcome of the judgment.”

Perhaps, however, the key to the situation is to be found in the following sentence—

“The modification Lord Esher went so far to find, *recklessly condemning this treatise for not suggesting it*, proves to be a cheat upon the Court.”

As, however, we have diligently searched several reports of the case, both in legal and lay periodicals, and have found no notice of the Treatise, good, bad, or indifferent, perhaps in the next edition any temporary irritation—possibly caused by a casual and unreported observation in the course of the case—may have passed away, and these four pages of diatribe be spared us. The references throughout the book to *Svendsen v. Wallace* are to the report in the Court of Appeal (13 Q.B.D. 69), and though the subsequent decision in the House of Lords (10 App. Cas. 404) does not invalidate any proposition for which the case is used in this Treatise, we cannot but regret not to have the editor's view on this important judgment, which, as we have already pointed out in a notice of Mr. McArthur's book on *Insurance*, is, in our opinion, widely misunderstood. With this exception, the book seems carefully brought up to date, there being even, in an addendum, a note to the decision of the House of Lords in the case of the *Mar. Ins. Co. v. China Trans-Pacific SS. Co.*, which is reported (11 App. Cas. 573) in the December number of the *Law Reports*, 1886.

In Mr. Carver's *Carriage of Goods by Sea*, we have a first essay by a writer from whose University achievements in the exact sciences we have a right to expect a logical and well-ordered dissertation on any subject he takes up. The book, moreover, is dated from Liverpool, and hence we may not unreasonably conjecture that it is the result not merely of hunting out principles from reported cases, but also of the practical application of those principles to cases and questions which, in that maritime city, crop up almost hourly, and we venture to think that the book fulfils these expectations. Although we might, when the book first

came into our hands, have been disposed to regret that the author had not added a chapter concerning the Carriage of Passengers by Sea, we are consoled by having now before us the most important decision of the Court of Appeal in the *Bernina* (*Times*, 24th January, 1887, W.N., 1887, p. 20), which would have required the rewriting of the whole of such a chapter. We may, however, express our hope that another edition, or a Supplement, will shortly give us such a valuable addition to the work. We are glad to learn from the book (p. 398) that the point we have already referred to in the judgment of the House of Lords in *Svensden v. Wallace* has not escaped attention, and that the Association of Average Adjusters, who, as we are informed in that case, endeavour to follow the Law, have drawn up a general rule embracing what they conceive to be the law of *Atwood v. Sellar* and *Svensden v. Wallace*. The rules laid down by them on the subject, and of which we have a copy in Appendix C, are so clear and distinct on a naturally obscure and difficult matter, that we probably shall hear no more of the questions in the latter case which have not been actually decided by the House of Lords. We are also glad to find the text divided into sections of convenient length, that is, each averages about a page, there being 743 pages and 731 sections. The convenience of this division is not so apparent in a first edition, but when there are several, a reference to a page in another edition than the one before the reader is not only useless but misleading, whereas sections need never be altered. Where there is so much to praise, we feel sure that the author will be grateful to us for pointing out some trifling inaccuracies which he will do well to correct in a new edition. Thus, section 120 would lead the casual reader to suppose that a Charter-party could not be made available in evidence, if unstamped at the trial, whereas it is, of course, no exception to the general rule that documents can be

stamped at the trial on payment of the heavier penalty and fine under section 16 of 33 & 34 Vict., c. 97. We do not see how, as stated in section 354, where cargo owners have had to pay salvage in consequence of the wrongful act of the master, they can proceed against the ship *in rem* to recover the amount so paid. In such a case the action is for "damage to cargo," the salvage paid being an element of the damage; but damage to cargo only gives rise to a suit *in rem* under the particular case (24 Vict., c. 10, s. 6) where no owner of the ship is domiciled in England or Wales. It would be hypercritical to draw attention to other very trifling slips we have come across, and as no author can be expected to have the gift of prophecy, we cannot blame Mr. Carver for not having foreseen the decision in the *Bernina* already referred to, which, though mainly concerning passengers, yet incidentally will make a difference in the wording of section 704 at all events, as it distinctly overrules *Thurogood v. Bryan*, there referred to, somewhat doubtfully be it said, as an authority, nor those in the two cases in which the *Sailing Ship Garston Co.* has been concerned, (15 Q.B.D. 580) as to the meaning of the word port, and (18 Q.B.D. 17) as to damage caused to cargo by a collision with another vessel wholly caused by that other vessel. Moreover, if we are not misled by a similarity of name, the author of the book himself argued the two last-named cases—an encouragement, by the way, to authors of Law books on special subjects—so that we may be pretty sure of seeing them in a second edition, and may hope that he will not be in a position to echo, thinking of his own case, "Oh! that mine enemy had written a book." Mr. Carver has certainly supplied material to go a long way in deciding many vexed questions of Shipping Law. Whilst, however, we are speaking of second and further editions, we think it a good opportunity to say that in our opinion it would be desirable in the interests alike of authors, publishers, and

readers, if, in the case of Law books generally, instead of bringing out a new edition every three or four years, with the result that almost everyone has a different edition, for no man can be expected to buy each as it comes out, the author, from time to time, gave the world a Supplement, drawn in the form of “*addenda*,” “*corrigenda*,” and “*errata*” with references to his text. The insertion of the paragraphs, if the Supplement were printed on one side only of the paper, or the copying out of it into the book would be simply a clerk’s work, and the references would be uniform. As it is, the busy practitioner finds it practically impossible to note up all his text books, and though, no doubt, by virtue of that peculiar legal faculty which gives him the opportunity of being busy, he has a good memory for the newer cases, yet the hunting up of them, for the sake of their *ipsissima verba*, causes the loss of valuable time. To apply this principle to the books we have been considering, the third edition of *Arnould on Marine Insurance* was practically a new book, but the subsequent ones might have been spared, if the plan here suggested had been adopted. Everyone who has bought a copy would not only have bought the original, but also each annual or biennial Supplement, and only the sale of the few copies in the cases where persons have now two copies would be lost, whilst, on the other hand, there would be no relics left on the publishers’ hands, in the shape of unbound and unsold copies of early editions. In the case of *Pritchard’s Digest*, as we have already pointed out, each edition is practically a new work, but the labour expended on bringing out each would have been very much lessened had there been Supplements to the former one brought out from time to time. The division of Mr. Carver’s book into sections renders this method still more particularly applicable to it, and we hope to see a Supplement containing a chapter on the Carriage of Passengers by Sea, and bringing the work in

other respects up to date, in the course of the present year. At the present moment, anyone wishing to set up as a "Sea Lawyer" will find himself well fitted up with a great portion of the tools of his trade, if he becomes the possessor of the books which have been the subject of this article. He must, however, supplement them by a good book on Collisions at Sea, and on the Practice of Courts having Admiralty Jurisdiction, and, having mastered these, will still find occupation in picking up, from some general text-books of Maritime Law, the law as to Mortgages of Ships, Bottomry and *Respondentia*, and Wages and Disbursements, beyond which again is the now almost forgotten realm of Prize Law, a subject in itself more interesting than any other branch of Law, for of what other Reports would anyone have said, "I am very deep in Lord Stowell's Reports, and, if it were war time, I should officiate as Judge of the Admiralty Court. It was a fine occupation to make a Public Law for all nations, or to confirm one; and it is rather singular that so sly a rogue should have done it so honestly" (Sydney Smith's *Letters*). In the present condition of Europe, a knowledge of Prize Law may, at any moment, become of the highest importance both to its possessor and to the Empire.

III.—FOREIGN MARITIME LAWS.

II.—ITALY. CODE OF COMMERCE. BOOK II. TITLE VI.

CHAPTER II.

Abandonment.

632. The things insured may be abandoned in the following cases :—

- (1.) Shipwreck.
- (2.) Capture.
- (3.) Arrest by order of a Foreign Power.
- (4.) Arrest by order of the Government subsequent to the commencement of the voyage.
- (5.) Unseaworthiness, if the vessel cannot be repaired, or if the expense necessary to refit and repair her and put her into a condition to resume her voyage amount to three-quarters at least of the value insured.
- (6.) Loss or deterioration of the things insured amounting to at least three-quarters of their value.

In any other case the assured can only require to be reimbursed for the average loss he has suffered.

B. Bk. II., 199, F. 369, G. 865, H. 663, 666, P. 1789, 1792, R. 1247, S. 900, 901, Sw. 258, 259, 261, E. 211.

News. § 151, 152; M. and P. 484, 541—543; Arn. 13, 846.

633. The assured may abandon without proving the loss of the ship if, in ocean voyages a year, and in other voyages six months, have elapsed from the day on which she sailed, or from that on which the last news was received of her.

In the case of time insurance [*assicurazione a tempo limitato*], when the periods above mentioned have elapsed, the loss of the vessel is presumed to have happened within the period of the insurance.

If there are several successive insurances, the loss is

presumed to have happened on the day following that to which the latest news (of the vessel) relates.

B. Bk. II., 207, 208, F. 375, 376, G. 835, 866—868, H. 667, 674, P. 1793, 1800, R. 1253 Diff., S. 908, 910., Sw. 260—262, 267, E. 215.

News. §§ 33, 151, 152; M. and P. 484. 540; Arn. 682, 853—858, 913.

634. If the ship is abandoned as unseaworthy, the goods which are insured on board her may be abandoned when within the three months succeeding the condemnation no other vessel could be obtained on which to reload the cargo and have it carried to its destination.

B. Bk. II. 223, 224, 227, F. 390, 391, 394, G. 822, 634, H. 673, 478, P. 1588, S. 877, 924, 927, 928, Sw. 221, 258, E. 228, 229.

News. § 154; M. and P. 529, 532; Arn. 338, 341, 949, 950.

635. If, in the case provided for in the preceding article and in Art. 514, the goods are loaded on board another vessel, the insurer must pay for damages which they sustain, the expenses of unloading and reloading, of warehousing and watching them, the excess of the (new) freight, and all other salvage charges, up to the amount of the sum assured, and if it is not exhausted by these, the insurer continues to bear the risk for the amount of the surplus.

B. Bk. II. 225, 226, F. 392, 393, G. 820, 823, 824 (5), 831, 838—852, H. 628, 632, P. 1799, R. 1262, S. 925, 926, Sw. 242, E. 230, 231.

News. § 154; M. and P. 542; Arn. 341, 732.

636. In case of embargo by order of a Government or in case of capture, an abandonment of the things under embargo or captured cannot be made until three months have elapsed from the news of the disaster, if it has happened in the Mediterranean, or Black Sea, or in any other European sea, in the Suez Canal, or in the Red Sea, nor until six months from the news, if the disaster has happened elsewhere.

For such cargo as is perishable, the periods mentioned above are reduced by one-half.

B. Bk. II. 220, F. 387, G. 865, 868, H. 663, 665, 668, 673, P. 1780, 1781, 1791, 1794, S. 905, 929, Sw. 221, 261, E. 225.

News. §§ 153—155; M. and P. 488, 489; Arn. 676, 928, 945, *Rodonachi v. Elliott*, L.R. 8 C.P. 649; L.R. 9 C.P. 518.

637. An abandonment to the insurer must be made within the time following :—

Three months from the day on which information of the disaster is received, if it has happened in the Mediterranean, or the Black Sea, or in other European seas, the Suez Canal or the Red Sea ; six months if it has happened in other African seas, the West or South of Asia, and the Eastern seaboard of America.

One year, if the disaster has happened elsewhere.

In case of embargo by a Government, or in case of capture, these periods only begin to run when those laid down in the preceding article terminate. When these periods have expired, the assured is not permitted to abandon, saving (his right) to proceed for the average.

B. Bk. II. 203, 220, F. 373, 387, G. 865, 868, 869, H. 663, 665, 667, 668, 671, P. 1791, 1797, R. 1247, S. 904, 905, 929, Sw. 224, 259, 261—263. E. 213, 225, News. § 152 ; M. and P. 540 ; Arn. 853, 913, 914.

638. The assured may, at the time of giving notice of information which he has received, either abandon, and claim payment for the insurer of the sum assured within the time settled by the contract or by law, or he may reserve (his right to abandon) for the legal periods.

When making an abandonment, he must state the insurances effected or ordered, and the sums of money borrowed on Bottomry.

In default of so doing, the time for payment only runs from the day on which such statement is made, but the period in which to take proceedings for abandonment is not prolonged.

If the statement be fraudulent, the assured loses all rights derived from the contract of Insurance.

B. Bk. II. 210, 211, F. 378, 379, G. 873, H. 675, P. 1801, S. 911, S. 266, E. 216, 217.

19 Geo. II., c. 37, § 6 ; News. § 129 ; M. and P. 552 ; Arn. 310, 855, 1038.

639. Things insured cannot be abandoned partially or conditionally.

Only things which are the subject of the insurance and the risk are comprised in it (the abandonment).

B. Bk. II., 202, F. 372, G. 870, H. 677, P. 1803, S. 903, Sw. 264, E. 212.
News. §§ 156 ; M. and P. 939 ; Arn. 847.

640. The things insured belong to the insurer from the day when a notice of abandonment was made which has been accepted or declared valid. The assured must deliver to the insurer all documents which relate to the said things.

The insurer cannot, under the excuse of the ship's return, avoid payment of the sum assured.

B. Bk. II. 216, F. 385, G. 871, 872, H. 678, P. 1804, 1805, R. 1253, S. 913, Sw. 248, 264, E. 223.

News. §§ 156, 157 ; M. and P. 541--543 ; Arn. 863, 969.

641. In case of capture, if the assured is not able to give notice to the insurer, he may ransom the things which are captured without waiting for instructions.

But the assured must, as soon as possible, inform the insurer of the arrangement made. The insurer has the option of taking up the agreement on his own account, or of renouncing it: he must give notice to the assured of his choice within 24 hours of receiving notice of the agreement.

If he decides to take up the agreement on his own account, he must contribute without delay to the payment of the ransom, according to the agreement and in proportion to his interest, and continue to incur the risk of the voyage in accordance with the contract of Insurance. If he decides to renounce the agreement, he must pay the amount assured, but cannot lay claim to the articles ransomed.

When the insurer has not given notice of his choice within the time above mentioned, he is deemed to have renounced the advantages of the agreement.

R. 1074, 1259.

News. § 17 ; M. and P. 66 n. (t) 160, 487 n. (d) ; Arn. 780.

TITLE VII.

Averages and Average Contribution.

CHAPTER I.

Average Losses.

642. Every extraordinary expenditure made on behalf of the vessel or the cargo, together or separately, and all damages which the vessel and cargo suffer, subsequent to the loading and departure of the ship and prior to its return and discharge are averages [*avarie*].*

M. and P. 426 (y), 491 (f).

There are two descriptions of Average, great or general average and simple or particular average. The expenses which are usually necessary on entering or leaving bays, rivers, and narrow channels, and the expense of navigation dues and tolls, are not averages, but simple charges on the ship.†

Failing special agreements between the parties, averages are regulated in accordance with the following provisions.

B. Bk. II., 99—101, F. 397—399, G. 702, 703, H. 696—698, N. 69, P. 1813—1815, R. 1068—1070 Diff., S. 930, 931, E. 235—237.

643. Extraordinary expenses incurred and losses voluntarily sustained for the benefit and preservation of the ship and cargo in common are General Average.

Such are :—

- (1.) Things given as composition [*composizione*] (to obtain the release) or under the name of ransom [*riscatto*] for the ship and cargo.
- (2.) Articles jettisoned for the general safety.
- (3.) Cables, masts, sails, and other fittings cut away for the safety of all, or which are carried away in consequence of what is done for the safety of all.
- (4.) Anchors, chains, and other things abandoned for the safety of all.

* As to the meaning of the word "average" see note by MacLachlan to Pt. III., Ch. IV., of Arnould.

† See Art. 619, *ante*.

- (5.) Damage done by a jettison to goods remaining on board.
- (6.) Damage done to the ship by the jettison either voluntarily or as a necessary consequence of it, damage which the ship receives in facilitating the salvage of the cargo or in facilitating draining off or getting out water, and the damages which the cargo sustains from the operation.
- (7.) Damage done to a ship or cargo by steps taken to extinguish fire on board.
- (8.) The expenses of the medical attendance and board of seamen wounded in the defence of the vessel, and their funeral expenses in case of death.
- (9.) The wages and board of the members of the crew during an embargo or detention, when the vessel is put under embargo by a Government in the course of her voyage, or is compelled to waste her time [*trattenersi*] in port in consequence of war breaking out, or for some other similar reason which hinders her from proceeding on her voyage to her port of destination, until the ship and cargo are freed from their mutual obligations.
- (10.) The expenses of entering and leaving a port into which the vessel has been compelled to come by stress of weather, pursuit of enemies or pirates, an accidental leak, or by circumstances beyond control.
- (11.) The wages and provisions of the crew in a port of distress during the repairs which are necessary for the prosecution of the voyage, when such repairs themselves constitute General Average.
- (12.) The expenses of unloading and re-loading things which are landed to enable the above-mentioned repairs to the ship to be executed in a port of distress, the expenses of watching and the warehouse rent of such things as are warehoused.

- (13.) The expenses incurred to get a ship which is under arrest released or restored, if the arrest does not arise from something which relates to the ship or the private affairs of the captain, owner, or charterer exclusively, and the wages and provisions of the crew during the time necessarily occupied in getting such release or restoration if it is obtained.
- (14.) The expenses of lightening a vessel when rendered necessary by bad weather or other reason relating to the joint safety of ship and cargo, and the dangers which the ship or cargo sustains in the operations of discharging and reloading.
- (15.) Damages sustained by the ship and cargo by running voluntarily ashore [*investimento*], to save the ship in a gale or from capture or other imminent peril.
- (16.) The expense incurred in getting a vessel afloat again when run aground, as mentioned in the preceding clause, and the salvage payable for labour and services rendered on such an occasion.
- (17.) Losses and injuries sustained by goods put into lighters to lighten the vessel in the case pointed out in clause (14), including the contribution payable to the said lighter, and reciprocally injuries sustained by goods remaining on board the vessel, in so far as such damages were themselves General Average.
- (18.) The premium and interest on a Bottomry loan [*cambio marittimo*] given to cover disbursements which are reckoned as General Average, and the premiums of insurance of the same disbursements, as well as the loss sustained in repaying the owner of goods sold in the course of the voyage in a port of distress to meet such disbursements.

(19.) The expenses of settling the General Average. Damages which the ship sustains or disbursements made on account of her are not considered as General Average, even if voluntarily incurred for the general benefit and preservation of all, if they arise from defects in or age of the ship or from any default or neglect of the captain or crew. Apparel [*attrezzi*] and furniture [*corredo*] of the vessel jettisoned, and anchors, chains, and other things abandoned even voluntarily for the common welfare and preservation of all are not reckoned in apportioning General Average, unless they are found properly entered in the ship's inventory kept in conformity with the provisions of Art. 500. A jettison of ship's stores is never reckoned as General Average.

B. Bk. II., 102, 103, which distinguish expenses of a port of refuge according to whether the cause of putting in is itself General Average or Particular Average on ship or cargo, F. 400, 403, G. 708, 709, H. 424, 699—701, N. 69—71, P. 1816—1818, R. 1074, S. 932—936, Sw. 142, 143, 168, E. 238, 239.

Arn. 755—765; M. and P. 425, 428—433. *Attwood v. Sellar*, 5 Q.B.D. 286; *Svensden [Svendsen] v. Wallace*, 10 App. Cas. 404.

644. The following are considered as General Average:—

- (1.) The price or ransom of members of the crew sent on shore on the ship's duty and made prisoners or detained as hostages.
- (2.) The expenses of an unusual quarantine not foreseen at the time of chartering, if it affects ship and cargo alike, including the wages and provisions of the crew during the quarantine.

F. 267—269, 272, ransom is General Average only if seamen employed on duty on behalf of ship and cargo, G. 708 (6), H. 699 (8), P. 1816 (8), E. 238 (8).

Arn. 786, 790; M. and P. 431, 160.

645. If a jettison is necessary, it must as far as possible commence with goods least needed, most heavy, and least in value, then follow those on the first deck, then those on the next, and so on.

F. 411, H. 368, P. 1388, S. 911, Sw. 148, E. 246.

M. and P. 160.

646. All damages sustained by and all expenses incurred for the vessel alone or to cargo alone are Particular Average. Such are :

- (1.) Any loss or injury suffered by goods shipped, through bad weather, fire, capture, shipwreck, stranding, breaking up, or other such like casualty, or from circumstances beyond control [*forza maggiore*].
- (2.) Loss of masts, cables, anchors, sails and rigging, and any other injury which the vessel suffers from the causes mentioned in the preceding clause.
- (3.) Any damage sustained through the inherent defects in the ship or cargo.
- (4.) The expenses of putting into any place, occasioned by defects in the vessel, by a leak resulting from her age, by shortness of provisions, or by any other cause which can be imputed to the owner, charterer, or captain.
- (5.) The wages and provisions of the crew during the ordinary period of quarantine, or during repairs rendered needful by defects in or age of the vessel, or from any other cause which can be imputed to the owner, charterer, or captain, or during an arrest or a stay in harbour which concerns the ship alone, or the cargo alone, or the expenses in such case of obtaining the release of one or the other.
- (6.) Expenses incurred to preserve the goods shipped, or to repair casks, cases, or packages containing them, when such expenses are not the consequence of injuries reckoned as General Average.
- (7.) The excess of freight in the case referred to in Art. 570.

Injuries sustained by goods shipped from accidents occasioned by the negligence of the captain, or any other member of the crew, are Particular Average on the owners of the said goods, saving their claim over against the captain, or on the ship and freight.

Damages which the owners sustain through an unnecessary and unreasonably long stay in port are made good by the captain.

B. Bk. II. 102, F. 403, G. 703, 709, H. 701, P. 1818, R. 1071, 1072, S. 935, E. 239.

Arn. 823; M. and P. 826.

CHAPTER II.

Average Contribution.

647. Particular Averages are borne and paid by the owner of the article which has sustained the damage or occasioned the expenditure.

General Average is apportioned proportionally amongst the goods and half of the ship and freight.

The values of goods which have been sacrificed are included in making up the total on which Contribution must be made.

B. Bk. II. 104, 105, 107, 110, F. 401, 402, 417, G. 718, 723, H. 698, 727—729, N. 73, 75, P. 1815, 1841, 1842, R. 1073, 1075, 1093, S. 937, 948, 955, 956, Sw. 157, 161, E. 237, 250, 251.

Arn. 791, 804 *et seq.*, 824 *et seq.*; M. and P. 425, 426 (y), 434, 435.

648. The effects of the crew and passengers do not contribute to General Average if they are saved, and have a right to be contributed for if jettisoned or damaged.

B. Bk. II. 106, includes ammunition and provisions, F. 419, G. 725, H. 731, N. 76, P. 1845, S. 958, 959, Sw. 163, E. 254.

Arn. 792; M. and P. 434, 435.

649. Goods shipped for which there is no bill of lading [*polizza di carico*] nor receipt from the captain are not paid for, if jettisoned, and contribute if saved.

B. Bk. II. 109, F. 420, G. 710, H. 732, N. 69, P. 1846, S. 949, Sw. 150, E. 255. Arn. 767, 802.

650. Things carried on the upper deck [*coperta*] of a ship always contribute to General Average if they are saved.

When they are jettisoned or damaged by the jettison, except in the case of the voyages for which provision is

made in the last clause of Art. 498, they confer no claim for the loss and damage except against a captain who has loaded them on deck without the consent in writing of the shipper. Otherwise there is a special contribution between the ship, the freight, and other goods loaded on deck with the consent of the shippers, without prejudice to the general contribution for General Average of the whole cargo.

B. Bk. II. 109, F. 421, G. 710, H. 733, N. 69, P. 1847, S. 950, Sw. 86, 150 Diff., E. 256.

Arn. 796, 792; M. and P. 433, 434 (*h*).

651. If the jettison does not save the ship, there is no contribution. The goods saved are not subject to pay for the things jettisoned, nor for the repayment of damage suffered by other goods.

If the jettison does save the ship, and she is lost in the further prosecution of her voyage, goods saved contribute to the jettison on their value in the condition in which they are salvaged, less salvage expenses. Goods jettisoned do not, in any case, contribute in payment for damages which the goods saved sustain subsequent to the jettison.

The cargo does not contribute in payment for a ship which is lost or condemned as unseaworthy.

B. Bk. II. 111—113, F. 423—425, G. 703 (3), 705, 722, 724, H. 734—736, N. 69 (7), P. 1849—1851, 1854, S. 943, 944, 960, Sw. 160, E. 258, 259, 262.

Arn. 798—801; M. and P. 434.

652. Where goods put into lighters [*barche*] to lighten the ship are lost, the loss is apportioned between the ship and the whole of the cargo.

If the ship is lost with the remainder of the cargo, there is no claim for contribution against goods put into boats [*poste sugli scafi*] if the latter arrive in safety.

F. 427, G. 708 (2), H. 702—705, P. 1819—1822, R. 1083, 1084, S. 952, Sw. 143 (1), E. 264.

Arn. 768.

653. If, subsequent to the apportionment, goods jettisoned are recovered by their owners, such persons must return to the captain and those interested what they have

received out of the contribution, deducting the damages caused by the jettison and the expenses of recovering the goods.

B. Bk. II. 115, F. 429, G. 722, H. 739, P. 1853, S. 951, Sw. 162, E. 266.
Arn. 802.

654. The ship contributes on its value* at the place of discharge, or on the price for which it is sold, less particular averages subsequent to the General Average.

Freight which, in consequence of the agreement noticed in Art. 577, is gained even when the goods shipped are lost, is not subject to contribution.

B. Bk. II. 110, 105, F. 417, G. 719, 723, H. 727, N. 75 (1) (3), P. 1841, R. 1093, S. 955, 956, Sw. 157, 159, 161, E. 251.

Arn. 806, 808, 811; M. and P. 435.

655. Goods salvaged, and those jettisoned or otherwise sacrificed, contribute on their net [*netto*] value at the place of discharge. If there is such an agreement as is mentioned in the preceding Article, the freight is not deducted from the value.

B. Bk. II. 107, F. 402, G. 720—722, H. 727—729, N. 73, 75, P. 1842, R. 1093, S. 948, 955, Sw. 160, E. 250, 251.

Arn. 809—811; M. and P. 435.

656. The nature, species, and quality of goods which must contribute, and of those which are jettisoned or sacrificed, are proved by producing the bills of lading and invoices [*fatture*], and, failing these, by any other means of proof.

When the bills of lading [*polizza di carico*] allege a quality or value of goods loaded which is less than the true one, they contribute on their actual value, if saved, and are paid for on the basis of the quality or value shown, if they are jettisoned or damaged.

If, on the other hand, a quantity or value higher than the true one is alleged, the goods shipped contribute on the basis of the quality or the value shown, if they are saved,

* See Art. 647 *ante*, i.e., its value is ascertained by this Article, and it contributes on half of that value.

and are paid for according to their actual value, if they are jettisoned or damaged.

B. Bk. II. 108, F. 415, 418, G. 721, 731, H. 729, 730, N. 73, P. 1843, 1844, R. 1093 Diff., S. 946, 948, 957, Sw. 153, 155, 160, E. 250, 253.

Arn. 802.

657. The captain must, as soon as possible, draw up a formal statement [*processo verbale*] of every decision arrived at and operation executed for the general safety.

The statement must show the reasons for the decision and point out shortly the things sacrificed or damaged. It must be signed by the principal members of the crew, or be accompanied by the reasons for their refusing to sign, and must be copied in the log book [*giornale nautico*].*

A copy of this statement, signed by the captain, must be appended to the deposition mentioned in Art. 516.

B. Bk. II. 116, F. 412, G. 487, 490, H. 368, N. 19, P. 1388, R. 1090, 1091, S. 940, 942, Sw. 146, 149, E. 247.

M. and P. 427.

658. The adjustment, estimate, and apportionment of losses and damages is made up at the place of the vessel's discharge, at the captain's instigation, by experts named, if within the Realm, by the President of the Tribunal of Commerce or, failing him, by the Prætor, and in foreign countries by the Consular officer or his deputy, and, failing him, by the local authority [*autorità locale*]. The apportionment, when made out by experts, is subject to examination, if within the Realm, by the Tribunal of Commerce, and if in foreign parts by the Consular officer or his deputy, or by the local authority.

B. Bk. II. 118, F. 414, G. 729—731, H. 711, 722—725, N. 20, 77, 124, P. 1836—1839, R. 1092, S. 945—947, Sw. 164, 165, E. 249.

Arn. 811, 812; M. and P. 436.

659. No legal claim for Average can be brought against the shipper or against the consignee, if the captain has received the freight and delivered the goods which were

* See Art. 500, *ante*.

shipped without protesting [*protesta*], even when the freight was paid in advance.

B. Bk. II. 232, F. 435, G. 908 (2), H. 488, P. 1533, S. 964, Sw. 283, E. 274.
 Arn. 814; M. and P. 437.

TITLE VIII.

Damages caused by Collisions between Ships.

660. If a collision [*urto*] between ships is the result of accident or uncontrollable circumstances [*forza maggiore*], the damages and losses consequent upon it are borne by the things which have suffered them, without any claim to repayment.

B. Book. II. 228, F. 407, G. 737, H. 536, 540, N. 80, P. 1569, 1581, R. 1109, 1113, 1119, 1121, S. 935 (7), Sw. 172 (2), E. 242 (1).

M. and P. 631; Macl. 286.

661. If a collision is the result of a fault on board one of the ships, the damages and losses consequent upon it are chargeable to the said ship. The compensations payable to persons who are killed or wounded have priority, if the sum to be distributed (*i.e.*, generally the value of the ship and freight (see Art. 491, *ante*)) is insufficient.

B. Bk. II. 228, F. 407, G. 736, H. 534, N. 78, P. 1567, R. 1097, 1111, 1112, 1120, S. 935 (7), Sw. 172 (1) 175, E. 242 (2).

M. and P. 631; Macl. 286.

(a.) There is no express provision with regard to loss of life or personal injury, nor indeed with regard to cargo, either in the former Italian Code or in any other of the Commercial Codes, though the new Belgian Code, Book II., Art. 231, implicitly recognises such rights; there is, however, no doubt that such rights exist, as being claims for a *quasi delict* as to which the Civil Codes contain provisions, but apparently they have no priority, and extend only, in common with other claims, to the value of the ship and freight, in all States where an owner can free himself from liability for the acts of his captain by abandoning the ship and freight to the creditors. It appears that in France a claim can be brought against the owners of both ships jointly, when the Court will apportion the damage between them if both are to blame, and that such a claim, if by relatives for damages sustained by loss of life, should be in the Civil Tribunal as not being a commercial affair, but if for injury should be in the Commercial Tribunal (*Simon Ullander c. Louvel*, *J.D.I.P.*, 1875, p. 112), and this would probably be the law elsewhere in the absence of special provision,

and certainly was so in Italy under the former Code (see Arts. 91, 725 of former Code); but under this new Code, the Commercial Tribunal would appear in all cases to be the proper one (see Arts. 54, 870). In England, the Court of Admiralty could not exercise jurisdiction *in rem* in cases of loss of life (*The Vera Cruz*, 10 App. Cas. 59), as such claims did not exist at Common Law, and were only created by Lord Campbell's Act (9 & 10 Vict., c. 93 preamble), but could and did exercise jurisdiction in cases of personal injury (*The Ruckers*, 4 C. Rob. 73). The Common Law Courts, since Lord Campbell's Act, have exercised jurisdiction for claims for loss of life at sea in collisions or otherwise, though, as far as the present writer is aware, it has never been directly decided whether that Act applies to cases arising on the high seas or in foreign waters. The Act itself does not apply to Scotland (§ 6), and therefore not to Scotch Territorial waters, and presumably not to Scotch ships, if any distinction can be drawn amongst British vessels, neither does it apply to the Territorial waters of a British Colony which was self governing at the time of the passing of the Act; though no doubt, most, if not all such, have similar local Statutes, and it seems difficult to understand how an Act so limited can apply in Foreign Territorial waters or even on the high seas, in the case, at all events, where either the plaintiff or the defendant is a Foreigner, a Scotchman, or even a British Colonist. In Scotland, however, damages can in many cases be recovered by the survivor for the loss of life of a relative, though by no means on the lines of Lord Campbell's Act (see *Goodman v. L. & N. W. R. Co.*, 14 S.L.R. 449; *Renton v. N. B. R. Co.*, 6 S.L.R. 255; *Eister v. N. B. R. Co.*, 8 M. 980, 42 J. 575; *Thompson v. N. B. R. Co.*, 4 R. 115), under the Common Law of Scotland, as no doubt they could have been under the Civil Law of Rome, from which the former is so largely derived. And it therefore may be that the Court of Admiralty, always practising the Civil Law, except when, that Law being different from the Common Law of the Realm, it was prohibited from adjudicating cases in accordance with it, may always have recognised a right, similar to that recognised in Scotland and other countries where the Civil Law was in force, but could not enforce it whilst liable to prohibition, but that now, both for the reason that such a right is not inconsistent with Lord Campbell's Act, and also because as a Division of the High Court of Justice it cannot be prohibited, such a claim might be entertained by it in proceedings *in rem* or *in personam*, and whether the claim arose on the high seas or elsewhere.

In the case of cargo, it is clear from this and the following article that the wrong-doing ship is liable in Italy, as indeed in all States, to make good damage done to cargo on board either vessel, in the absence, so far as its own cargo is concerned, of special provisions in the Charter Party and Bill of Lading. But there is this difference between the Law of England and that of other States, that in England the carrying ship, in the absence of exceptions other than the ordinary "Perils of the Sea," is liable to her own cargo for loss by a collision occasioned by negligence, even if solely the negligence of the other ship

(*The Xantho*, 11 P.D. 170), though of course able to recover over from that other ship, but that the exception of "dangers and accidents of navigation" would in such a case free her from liability to her own cargo (*The Sailing Ship "Garston" Co. v. Hickie, Borman, & Co.*, 18 Q.B.D. 17). This decision does not appear at first sight of much importance, as if A. and B. come into collision solely in consequence of B.'s negligence, the cargo on board A. could recover in tort against B., whatever might be the terms of the contract of carriage with A., and if the cargo could and did recover on the contract with A., A. could add the claim to her own claim against B., and recover both, but in this case, the peculiar arbitrary limitation of liability by the Law of England to £8 per ton may make a grave difference in the position of A. Suppose A. is of 1,000 tons, and B. is of 100 tons, and damage is done to A.'s cargo amounting to £1,000, and an equal amount of damage is done to A. herself, if she is not protected by her Bill of Lading, the cargo will sue her and recover £1,000 in full, and when A. seeks to recover over against B. for this £1,000, and her own individual loss of £1,000, B. pays into Court £800, the statutory amount of her liability, and A. finds herself £1,200 out of pocket by the transaction, although perfectly blameless for the collision. If, on the other hand, she is protected by her Bill of Lading, she and her cargo will both sue B., and will divide the £800 paid into Court equally, that is each take £400 and each lose £600.

662. If it cannot be decided which of the colliding ships is to blame, or if both are to blame, each bears the loss and damage it has suffered without any claim to repayment; but each is liable to repay the whole damage and loss occasioned to the goods shipped, and for the compensation payable for personal injuries, in accordance with the provisions of the preceding Article.

B. Bk. II. 229. Silent as to case of doubt, if both to blame damages divided in ratio of fault. F. 407. Damages equally divided in case of doubt; the Code is silent as to case of both to blame, but the Courts have decided frequently in accordance with the law as now laid down in Belgium. G. 737. In both cases each bears his own loss. H. 535, 538. In case of doubt the whole damage apportioned between each ship and cargo, in proportion to value; where both to blame, each bears his own loss with a claim over against the masters. N. Silent as to case of doubt; where both to blame, amount payable to either, in discretion of the Court. P. 1568, 1570. Identical with Holland. R. 1110, 1120. Silent as to case of doubt; where both to blame, each bears his own loss, and compensates the cargo. S. 935 (7). A collision is always presumed to be accidental purely, and therefore a subject of Particular Average, i.e., each interest bears its own loss, unless one of the captains is proved to be in fault. (See note to Art. in Garcia, *Comm.* Ed. 7.) Sw. 172, 175. Silent as to case of doubt; if both equally to blame, each ship bears its own loss and

compensates its own cargo, but if one more to blame than the other the Court may decree the one most to blame to pay something to the other ship and cargo. E. 242 (3). In both cases the whole damage is apportioned between the two ships in the ratio of their respective values.

M. and P. 631, 632; Macl. 287—289.

(a.) In the former Italian Code, there was no express provision for the case of "both to blame," but, as the Code was practically identical with that of France, it is probable that in such a case the Courts would, as in France, apportion the damages between the ships in the same ratio as the culpability. In the other case mentioned in the article, *i.e.*, where there is "doubt" as to the cause of collision, the law formerly was that the joint damages were equally divided between the two ships. (See Art. 516 of the former Code.) It is somewhat remarkable that since 1875, when the Common Law of England in cases of collision between ships was altered by the Judicature Act (36 & 37 Vict., c. 66) § 25 (9), so as to bring it into accord with the law as administered in the Admiralty Court, on the erroneous supposition that that was the General Maritime Law of the world as administered in all Civilised States, with the result that now, in all English Courts, when both vessels are to blame, each pays half the loss of the other, Italy should have altered her law in the opposite sense, so as to make it coincide with the old English Common Law. At present, the law where both are to blame is as follows:—In England, and the Admiralty Courts of the United States, each pays half the other's damage. In the Common Law Courts of the United States (*Arctic Fire Ins. v. Austin*, 25 Amer. Rep. 221), and in Italy, Holland, Portugal, Russia, Germany, Denmark, Spain, and, as a rule, in Sweden, each bears its own loss, *i.e.*, these countries are in accordance with what was the Common Law of England prior to the Judicature Act. In Belgium, France, Norway, and in exceptional cases in Sweden, the joint damage is apportioned in proportion to the culpability of each, whilst, in Egypt, each vessel pays in proportion to its value. So that the method adopted by England and the United States, so far as they have adopted the law of the English Admiralty Court, so far from being that common to the Civilised world, is the only instance of such a practice. In the case of doubt, that is, where there is not evidence to satisfy the Court as to where the blame lies, in England (see *The Catherine of Dover*, 2 Hagg. p. 154), the Common Law Courts of the United States, Italy, Germany, Spain, Norway, and Sweden, each bears its own loss, whilst in the Admiralty Court of the United States (*The Nautilus*, Ware, 2nd ed., 529), and in France (407), and Denmark (*Emery v. Huntingdon*, XII. Amer. Rep., p. 25), each pays half the total loss; in Holland (538), Portugal (1570), and Egypt (242 (3)), each ship and cargo pays in proportion to its value, whilst Belgium, Russia, Norway, and Sweden have no special provision on the subject; but as, without a special provision, it is impossible to conceive that a person should be held liable in damages to another unless proved to be in fault, it is most pro-

bably the case that in these States the law is similar to that of England and the countries first mentioned.

It should also be noted that both the Italian and the Belgian law on these points has diverged from the French Code of Commerce. The former Codes of Belgium and Italy were identical with that of France, now each differs from the others.

(b.) Where both vessels are to blame there is a notable difference in English Law between the position of a cargo owner, on the one hand, and of an injured passenger, or the relatives of one who has been killed, on the other; the cargo can recover half its loss from the other ship, its rights against its own ship being determined by the Bill of Lading but with the result that the exception of "dangers and accidents of navigation" (see note to Art. 661), would not remove the carrier's liability for a collision contributed to by his own servant's negligence, any more than that of "collision" alone would (see Brett., L.J., in *Chartered Merc. Bk. of India, &c., v. Netherlands Indian Steam Navigation Co.*, 10 Q.B.D., at p. 531); whilst the passenger, if alive, or his representatives, if he is killed, appeared to be unable to recover anything against the other ship (*Seward v. Owners of Vera Cruz*, 10 App. Cas. 59; *The Bernina*, 11 P.D. 31). In the latter case, the Court of Appeal has, within the last few days (January 24th), decided that either a passenger or an innocent member of the crew can recover his whole claim from the other ship (W.N., 1887, p. 20), and, moreover, as seamen, though now excluded from, will probably be included in, the next Employers Liability Act (see the Report of the Committee, 11th June, 1886, par. 9), it would not be safe to say that the innocent seaman may not also recover from his own ship. In France, as actual contributory negligence is no defence to an action, but only goes in mitigation of damages (*Recuillet v. Chemin de Fer du Nord*, D.P., 1885—1—433), it would appear that where both vessels are to blame even the officer who gave the wrong order or seaman who executed it could recover from the other vessel, and a passenger or innocent member of the crew from either or both (*Simon Ullander c. Louvel*, *J.D.I.P.*, 1875, p. 112), and from this arises the practice of each vessel paying towards the total loss in proportion to the blame, which is now adopted in France (D.L., 1873—3—57, D.L., 1873—1—341, *Mit. Mar. Reg.*, 1880, p. 1459), and made the actual law in Belgium, though for some time after the enactment of the Commercial Code a view was held in accordance with the doctrine of our Common Law of contributory negligence (see Pardessus, *Cours de Dr. Comm.*, par Tarlier, Vol. I., Pt. IV., Tit. II., Ch. II., Sec. IV.). It appears, however, that so far as the carrying ship is concerned, her owners may contract themselves out of the liability by suitable expressions in the Bills of Lading (see *Dallos*, 21st July, 1885). Even under the former vague Italian Law the master was liable to his own owners for damage sustained by them when both vessels were to blame (*J.D.I.P.*, 1885, p. 457). In case of doubt as to the cause of collision, the rights of the cargo owner and passenger against the carrying ship would depend on

the Bill of Lading or passenger ticket, and the remarks made above relative to the case of "both to blame" would be applicable, as the onus is on the carrier to bring himself within the exceptions in the contract, save that the exception "collision" might be held to shift the onus of proof on to the plaintiffs, to show negligence on the carrier's part; whilst against the other ship they could recover nothing in tort if they failed to prove negligence against her. The only difficulty which could arise would be if the "doubt" was not (1) as to which of the ships was wholly to blame, or (2) as to whether the collision was not unavoidable, but (3) as to whether the other ship was wholly or only in part to blame for it. But this is now cleared up by the decision of the Court of Appeal in *The Bernina* (W.N., 1887, p. 20).

There appears to be still a doubt under the French Code as to the rights of cargo in a case where it is doubtful where the blame, if any, lies in case of collision, there being a decision (D.P., 64, 2, 140) that in that case the cargo can recover from neither ship, but from a note subsequent to that decision (see D.P., 73, 1, 342 (note 2)) the case would appear never to have been decided by the Court of Cassation; the argument, however, appears unanswerable that it would require express words to alter the rule of liability laid down by the Civil Code (see Art. 1382 of C.C.), and that the words in Art. 407, Com. C., § 3, refer expressly to the damage done and suffered by ships, and not to that suffered by cargo, therefore the cargo has no special claim against either ship, and as to its own ship it appears that in France the onus is on the cargo to show some neglect on the part of the ship, and not, as with us, on the ship to show that the loss was within the exception of the Bill of Lading. In the new Belgian Code, differing in this respect from the former one, which was identical with that of France, there is no provision for the case of doubt, and therefore, presumably, in such case neither ship nor cargo can recover anything from the other ship, whilst, as the Law of Affreightment remains practically the same as in France, the cargo could not recover anything from its own ship, and this would appear to be the case in Spain also, where, in the absence of blame attaching to either of the masters, damage by collision is treated as Particular Average (Sp. Com. Code, 935 (7)), whilst in Holland (Art. 538), and Portugal (Art. 1570), the joint loss of both ships and both cargoes is lumped together, and divided *pro rata*, as a sort of joint General Average on both ships and both cargoes; hence it may happen that an innocent cargo may be called on to contribute to the damage done to another ship. In Germany attempts were made to adopt a similar principle in case of doubt, but were thrown out by the Commission on the Code (see note 4 to Art. 737 of the German Code, translation edited for the Société de Législation Comparée, by Gide, Flach, Lyon-Caen, and Dietz), and therefore the cargo can recover nothing against the other ship, and as regards its own ship its rights are regulated by the general Law of Affreightment and the contract of Charter-Party and Bill of Lading, as in England.

663. The liability of the ships as laid down in the preceding Articles leaves that of the actual wrong-doers to those who are damaged and to the owners of the ships intact.

B. Bk. II. 230, 12, 21, F. 216, 221, 230, G. 736, H. 534, 535, 349, 321, in N. 78, 79, the wrong-doer is primarily liable personally, but there is claim *in rem* against the ship for six months after the person injured knows of the facts, P. 1567, 1568, 1390, 1363, 1339, 1583, R. 1111, 1121, 1218, 890, 894, 918, 919, S. 935 (7), 622, 624, Sw. 172, 175, 49, E. 242, 30, 35, 89.

M. and P. 614.

664. When one vessel has collided with another innocently [*senza colpa*], in consequence of a former collision for which a third vessel is in fault, the whole liability is on the third vessel.

G. 741.

M. and P. 624; *The Thames*, 44 L.J. (Act.) 23; *The Industry*, L.R. 3 A. & E. 303; *The Sisters*, 1 P.D. 117.

665. The action for damages [*azione di risarcimento*] by collision of ships is barred, if no claim is made within three days before the authority of the place where it happened or where the vessel first touches.

As to damages caused to people or goods, a default in making a claim does not prejudice those interested, when they are not on board the ship, or are not in a position to carry out their intention.

B. Bk. II. 232, 233, F. 435, 436, G. 906 (2), 908 (3), H. 742, N. 79, P. 1859, 1860, Sw. 284, 286, E. 274, 275.

The proper tribunal to entertain a cause of collision, even when both vessels are foreign, and of different nationalities, and the collision takes place on the high seas, is that of the port into which the injured vessel puts, or if she sinks, then that at which her crew are landed. *J.D.I.P.*, 1885, p. 419, *Ann. de la Jur. It.*, III., 2, 320, IV. 1, 356.

See notes to Belgian Code, Bk. II. Arts. 230—233.

F. W. RAIKES.

IV.—THE PROPOSED SURRENDER OF TREATY PRIVILEGES IN JAPAN.

IN the number of the *Law Magazine and Review* for August, 1886, I contrasted the social and political condition of Japan, which, in the year 1856, called for the exemption of foreign residents from native control, with the sustained and consistent administration of the last twenty years, the new ideas of public rights and society now prevalent throughout the country, and generally with the course and acts of public authority on which the claim for a surrender of the immunity is based. I represented what those immediately interested had to say in opposition to the present surrender of their privileges, and pointed to the want of agreement among the Treaty Powers, and the non-existence of any body of Civil Law, as obstacles to be surmounted before any Treaty modification involving the abolition of the Consular Courts could take effect. And I concluded by a suggestion to hasten the contemplated enactment of a Code acceptable to Western sentiment, and to tender a definite scheme which one or more Powers could then accept, independently of the dissentient nations, in the event of unanimity still being found impossible ; and by a proposition, applicable to the intervening period, relative to the opening of the country to trade and residence, and the exercise of native jurisdiction over all persons taking advantage of the permission to reside beyond the limits of the open ports.

Following almost immediately on the publication of my article, a scheme for the immediate settlement of the question of foreign jurisdiction in Japan was described in the *Times*, and announced as having been proposed by the British and German Ministers, and as being about to be

concluded between Japan and the several Treaty Powers. The anticipated conclusion, however, has not yet been reached, and an opportunity, of which I propose briefly to take advantage, is still afforded of examining the scheme in its details. Its main features are the postponement of its operation until the completion and enactment of a Civil and Commercial Code, framed to the satisfaction of the Foreign Governments concerned; permission to travel, trade, and reside, without license or passport, in any part of the Empire; the assumption, immediately the new Treaties take effect, of Imperial jurisdiction (except in capital offences) over strangers outside the now open ports, and the extension of this authority, three years later, over residents within these limits; the reinforcement, during a period of fifteen years, of the native staff of Judges, by foreigners capable of holding corresponding offices in their respective countries; their preponderating authority in causes affecting the subjects of the Treaty Powers; the use of English as a *langue judiciaire*; and, on the expiry of the period of fifteen years, the unconditional abandonment of every immunity enjoyed by foreigners, and the recognition of their equality with subjects of the Mikado before the laws of the country. This scheme, while it rightly yields the jurisdiction due to Japan's admission into the Commonwealth of Nations, asserts the need for a guarantee, for some time to come, that the new authority to be entrusted to the native Tribunals will be properly exercised, but when it comes to a description of the means reserved for the foreigner's protection against a maladministration of justice, it affords, in the illusory character of the safeguards interposed, too much evidence of hasty and insufficient consideration.

What is lacking in the Legal system of Japan at the present moment, and against the evils likely to arise from which any safeguard should be effectual, may be briefly

stated as being known and good Laws generally approved by, and in accordance with, the habits and sentiments of the bulk of the people subject to them, and capable and independent Judges, whose actions are subjected to public inspection and opinion. Although modern Penal Codes exist, and have been in force during the past five years, and the enactment of a Civil and Commercial Code is made a condition precedent to the operation of the new scheme, it will for some time remain uncertain whether the new body of Civil Laws is capable of being administered. It is being prepared at the instance of a Ministry in no way responsible to the people, and will be framed as much in anticipation of the requirements of Foreign Governments as of the needs of the native community. With this object in view, it must incorporate Foreign Law to a material extent, even if it aims at a codification of such of the old customs as may be applicable to the new state of society, or it may consist of a system of abstract and general Law, entirely borrowed from external sources. In either event, its application will effect unforeseen changes in every department of life, and it is important, before placing too much confidence in the proposed new Code, to ascertain to what extent these modifications of their existence will harmonise with the feelings and temper of the native population, for, unless it is accepted by them as an authoritative or recognised rule of Civil Law, and their co-operation in its execution is thus obtained, it will prove of little value to the foreigner as a means of enforcing his rights and privileges. The notion of the maturity of the Japanese people for so far reaching a reform receives no support from the recent introduction of a body of French Criminal Law, of which the new Penal Codes mainly consist, or from their apparently successful working. These Codes did not order anew the daily life of the people in conformity with a foreign standard, nor did they remodel their business

relations or interfere with long-standing and cherished customs, as the Civil Code will. They were received as an amelioration of hardship, and that the more readily because of the implacable and sanguinary laws they supplanted, but a readiness to accept and appreciate such a gift need not imply that the spirit of Reform in the recipient people corresponds with that of their rulers. It should also be recollected that we possess but limited means of independent and trustworthy information as to the perfect or imperfect execution of these Codes during the short interval they have been in force, owing to the facts that subjects of Foreign Powers are not at liberty to reside outside the foreign settlements, and that the native press is closely supervised by Government Agents. But it is in respect of its Judges and the relation in which they stand to the Government that the Legal system of the country is most faulty. From the inevitable nature of things, the ability to explain and apply a systematic body of Law, the function of interpreting written Law, the experience which fits one to supply what is wanting in all Codes, the capacity to frame rules of Procedure—without which a Code may frequently become a dumb letter—the knowledge derivable from practice as a member of an organised Legal Profession, are attainments the development of which must be gradual, even where their acquisition has been aided by circumstances, and in Japan these circumstances have not only been, but have only recently been felt to be, absent. The inability of the native Magistrates to administer the Codes to the satisfaction of Foreign Governments, as well as the gradual but still imperfect development of the Judicial system, may be illustrated by the introduction of professional advocacy in the Courts, although still in its initial stage, by the new requirement of *some* educational qualification and experience in a Judge, and by the termination of a practice, the prevalence of which is indicated in the prohibition, of selecting

Judges from discharged employés of other branches of the Government Service. Of all means to secure liberty and rights under the new Laws, perhaps none is so important as an independent Judicature ; but, by the constitution of the Government itself, the Magistracy is necessarily dependent upon it, greatly to the detriment of the moral strength of the Imperial Courts. Although the State is fast gravitating towards Government by Popular Representation, the direction of affairs is at present in the hands of a Cabinet nominated by, and responsible to, the Sovereign alone, and it is under the advice of this body that the power of appointment and removal of the Judges, also vested in the Emperor, is exercised. The Judicial officers are thus dependent on the will, nominally of the Emperor, but in reality of Ministers not answerable to the Nation, for their nomination, remuneration, and retention of office, and the only compensation for the want of confidence in the discharge of their Constitutional functions which this state of things gives rise to, is to be found in such a check as Administrative routine imposes, and in the uncertain presence in the Cabinet of such men as the Prime Minister and the Foreign Secretary, who have done so much for the regeneration of the country they now rule. The apprehensions caused by this dependence on the Executive are increased by the freedom of all questions affecting the Government from exposure to the criticism and vigilance of the Press. Narrow restrictions are imposed by Press Laws on publications of a political nature, and a strict supervision is exercised through the agency of Provincial Governors over every portion of the Press throughout the country. The right of meeting in public for the discussion of public affairs is also subject to restraints of a similar kind.

The only means provided by the new project to avoid the adverse operation of the drawbacks to the native

system just referred to, are the temporary employment of persons drawn from other nations, whose sole necessary fitness is a certain technical qualification. No precautions are taken to provide adequate public supervision of Judicial proceedings, to ensure in the foreign Judge more efficiency, or to obtain for him a position of greater independence than that of the native Magistrate, who is to be superseded in his favour ; and the effect of the omission is not only not to supply what the Legal organisation of the country lacks, but by enabling the authorities to point to the presence of foreigners on the Bench as a fulfilment of their Treaty obligations, to furnish them with a ready answer to any complaint of their administration of Justice. They are no mythic persons who are technically qualified to hold Judicial offices in some of the countries between whom and Japan there exist Treaties of Commerce, and who, nevertheless, possess few of the qualities and attainments essential for the position they would have to occupy under the proposed scheme, and if no check is retained tending to greater efficiency than is afforded by this stipulation, it would be better unconditionally to relinquish our privileges at once, and leave the responsibility of applying effective means for a proper administration of Justice to foreigners entirely with the Japanese authorities. If safeguards are to be of any value, they should take more fully into account the dangers to be guarded against ; they should be open to review as time advances and new circumstances arise ; they should not cease until their dispensation has been rendered safe by the achievement of the end they have in view, nor should the irksome obligations continue a day beyond the absolute necessity for their existence. Let the Tribunals set aside for dealing with foreign interests be strictly national, and the foreign Judges be appointed by and become responsible to the Japanese authorities only ; but the Judges should be

required not to engage in other business occupations, and their independence should be placed above suspicion by a certain fixity of tenure of office ; the privilege of trial by a Jury of foreigners, selected from a list drawn up from time to time by the Consular body, might be permitted on the trial of offences of a grave character ; the new Laws should be declared to be immutable during a fixed period ; the Press, both native and foreign, should have full freedom to report and comment on all legal proceedings, and the arrangement arrived at should be open to revision at any time, at the instance either of Japan or of the Powers with which it is concluded. The rulers of Japan, knowing that the revision would proceed on the action and results of the intervening administration, and that these would be at all times made known through the medium of the newspapers, would take care to justify the trust reposed in them by making Judicial appointments, both native and foreign, of a character to ensure a skilful and just administration of their laws, and would, in the early removal of all extraneous buttresses which would follow on the completion of their legal fabric, have continuously before them an inducement to push forward their judicial and administrative organisation. They would thus both justify the trust reposed in them, and hasten the withdrawal of the safeguards at present required, by the improvement which would be effected in the organisation of their Legal system.

If, after the promulgation of acceptable Laws, satisfactory provision is made for their administration, there can be no good reason for complicating matters by postponing for three years the application of the scheme to the open ports, and in Yokohama, the largest Foreign settlement, there exist exceptional materials for supplying the required guarantee, if, indeed, they are available for the purpose. We have there a perfectly-equipped Superior British Court, commanding universal confidence and respect, not only amongst the

British residents who constitute the majority of the residents, but throughout the different Foreign communities. If, on the abolition of the Consular Courts, this Court were converted into a Japanese Tribunal with Appellate jurisdiction from the Courts that would be substituted for the Consular ones in the other open ports, as well as original jurisdiction within its own district, and, still further, if the Foreign community were to see the new Tribunal presided over even temporarily by the experienced Judge of that Court, an easy and simple method would be discovered under which those hitherto so tenacious of their Treaty privilege of Extra-territorial jurisdiction would at once, and almost imperceptibly, pass under the laws and jurisdiction of the Land of the Rising Sun.

G. PARKER NESS.

V.—FEDERAL CONSTITUTIONS IN THE U.S.A. AND BRITISH COLONIES.

I.—U.S.A. AND CANADA.

THE subject of Federal Constitutions, and the relations thereunder of the Federal Powers and of the State Powers, is one which has become of more than ordinary interest in this country in recent times. We therefore propose to notice briefly some of the salient points that strike us in the accounts given of the Government of the United States and of the Government of the Dominion of Canada by Americans and Canadians, as well as by Constitutional jurists of other nationalities, and we also propose to notice the commencement of Federation, or what is so styled, in the shape of a Federal Council in our Australian

Colonies. In this survey we shall take as much as we can from local sources, though we shall also avail ourselves of the stores of information and valuable independent criticism in the *Annales* and *Bulletins* of the Society of Comparative Legislation in Paris, and the interesting manuals of Comparative Constitutional Law published by M. Demombynes and M. Dareste, and other kindred writers.

Commencing with our Kin beyond Sea of the great Transatlantic Republic, we would draw some topics for consideration from the last volume of the very valuable *Reports of the American Bar Association* (Vol. VIII., *Report of Eighth Annual Meeting*, 1885. Philadelphia, Pa. 1885), and therein, in the first place, to the interesting Constitutional Essay by Mr. Richard M. Venable, of Baltimore, entitled "Partition of Powers between the Federal and State Governments."

Mr. Venable, of course, starts from the Convention of 1787, which, as he says, "devoted most of its labour to the structure of the Government." The Government so constructed, Mr. Venable necessarily admits to have been framed "on the model of the British Constitution," or, as he proceeds to explain, "at least, of what was then thought to be the British Constitution." Whether this qualification veils a sarcasm at some modern aspects of our position we are not certain, only we are somewhat reminded of a strongly-worded statement, in a recent work on *American Railroads*, noticed by us in another part of this *Review*, whose author, Mr. Swann, broadly states that "Queen Victoria has abdicated in favour of Mr. Parnell!" The language of Mr. Venable might seem patient of a similar construction, though we do not know that it was so intended.

Taking the statement of Mr. Venable in its simplest form, we see, what most writers have seen, that the Mother Country afforded the norm for the Constitutional

development of the young and vigorous daughter. The alterations made were the necessary result of the altered circumstances. The Government, as Mr. Venable says, had to be Republican; the proportionate representation of the larger and smaller States had to be adjusted and the basis of representation had to be fixed. "This necessitated," he continues, "the engrafting of important modifications on the model, but the framers never lost sight of that model."

In a Federal Government there must need be two classes of powers, the powers conferred on the Central Government, and those not so conferred, which remain with the several States. These powers Mr. Venable calls respectively the "structural" and the "functional."

During the Revolutionary period, there was, naturally enough, little or no sharpness of demarcation drawn between these powers. With Peace and the recognition of Independence, however, a new era dawned, the era of a written Federal Constitution. A partition of powers, however, was no new thing in America. It was not an invention of the framers of the American Constitution, for it had existed, though in a somewhat crude state, throughout the Colonial period from the very first. During the Colonial period, says Mr. Venable, matters of Imperial concern had belonged to the Imperial Government, and matters of Local concern to the Colonies and to the Local Governments. There was, unquestionably, Mr. Venable of course admits, a power in the Crown to revise and veto local measures, but the power was not systematically exercised. It is perfectly clear, moreover, as Mr. Venable says, that "interferences from England did much to create the alienation from the Mother Country which culminated in the Revolution."

The original Articles of Federation did not entrust the regulation of Commerce to the Federal Power, and Mr. Venable attributes the collapse of the first scheme of

American Federation rather to the defective Partition of Powers between the Federal and State Governments than to the "anomalous and amorphous character of its structure as a Government."

After the Convention of 1787, however, there could be no doubt, says Mr. Venable, that "the highest attributes of independent Sovereignty would be committed to the National Government." To this Government were to belong the powers "directly to raise revenue, to control our foreign relations, to declare war and make peace, and to regulate the commerce of the country," and, furthermore, this Government it was which, "within the sphere fixed for it by the Constitution," was to be "Supreme."

If we turn from this picture of the Constitution of the United States to the consideration of the Enactments of the British North America Act, 1867, secs. 91 and 92, which have given rise to considerable differences of opinion as to construction, we may, perhaps, better understand what it was intended should be the Central Government of the Dominion of Canada.

Among the Powers falling under the "Exclusive Legislative Authority of the Parliament of Canada," as stated by Mr. Travis, of St. John's, New Brunswick; in his Essay on *The Constitutional Powers of Parliament and of the Local Legislatures under the B.N.A. Act, 1867* (St. John's, N.B., Sun Pub. Co. 1884), we find enumerated in sec. 91, the following salient Federal Powers: "2. The Regulation of Trade and Commerce. 10. Navigation and Shipping. 12. Sea Coast and Inland Fisheries. 21. Bankruptcy and Insolvency. 26. Marriage and Divorce." This seems clear enough. But, unfortunately, some of the classes of subjects enumerated in sec. 92 of the same Act as within the "Exclusive Powers of the Provincial Legislatures," are subjects which fall under some of the heads above detailed as belonging

to the Dominion Parliament, viz., "9. Shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes"; "12. The Solemnisation of Marriage in the Province"; "13. Property and Civil Rights in the Province." But if Parliament has the exclusive right of legislating on *all* matters connected with Trade and Commerce, argues Mr. Travis (*op. cit.*, p. 5), in shop, saloon, and other licenses, would come within the wide field of all matters relating to the regulation of Trade. And similar difficulties seem to arise with regard to the other subjects enumerated, on which it would be, says Mr. Travis, "not only virtually, but absolutely impossible" to legislate without interfering with Property or Civil rights, or one or other of the several subjects enumerated. Mr. Travis has a solution for this difficulty, and reads the crucial section 91 thus: Parliament may, "for the peace, order and good government of Canada," make laws "in relation to all matters" by the Act "not assigned exclusively to the Legislatures," and also without interfering with the general right of Parliament to legislate as above on all matters not so assigned to the Legislatures; it shall also have the power, notwithstanding anything in the Act, to exclusively legislate on all matters coming within the enumerated classes of subjects (naming them). And then, by the passage at the close of the section, "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," Mr. Travis argues that, in effect, no matter how much the classes of subjects enumerated in the 91st section may come within the class of matters named in the 92nd section, they shall not be deemed to do so, so as to prevent legislation by Parliament on the subjects enumerated in

section 91, no matter how much such legislation may appear to interfere, or may actually interfere, with the subjects named in section 92, or with the legislation of the Legislatures, or with their right to legislate, with respect to such subjects, so named in section 92.

We must confess that the question discussed by Mr. Travis appears to us a complicated one, and we are glad to find the complication admitted by a Canadian contemporary, the *Manitoba Law Journal* (Winnipeg, Man.), in Vol. II., No. 2, for February, 1885. The subject of Mr. Travis's discussion, the *Manitoba Law Journal* admits, is "confessedly intricate." We quite agree, and we could wish that a full and impartial discussion of the whole question of the relations of the Dominion Parliament and the Provincial Legislatures of Canada were before us. We should study it with deep interest, and should hail it with great pleasure as a beacon light to guide us through much darkness of Constitutional controversy.

Quarterly Notes.

The Hungarian Penal Codes of 1878 and 1879.

We have received a valuable addition to our library (*Code Pénal Hongrois des Crimes et des Délits* (28 Mai, 1878), *et Code Pénal Hongrois des Contraventions* (14 Juin, 1879). Traduits et annotés par C. MARTINET et P. DARESTE. Paris. Imp. Nat. 1885), on opening which our eye rests upon the significant announcement: "Ce volume a été préparé sous la direction de la Société de Législation Comparée, et imprimé aux frais de l'Etat avec l'autorisation de M. le Garde des Sceaux, sur la proposition du Comité de Législation Etrangère." The thought that

immediately strikes one is—Where is *our* Society of Comparative Legislation? Where is our National Press? And where is our Keeper of the Seals and where our Committee on Foreign Legislation, upon whose authority and recommendation any similar English publication could be issued at the public cost? In these days of trade depression and extensive war preparations, it is, perhaps, too much to expect a Popular Assembly to set apart any portion of the Public revenues for the advancement of the chief of the arts of Peace; but might not some of the deficiencies pointed out be remedied by voluntary co-operation and private enterprise?

Every new work brought out under the auspices of the *Société de Législation Comparée* (now of twenty-eight years' standing) should be a forcible reminder, as it undoubtedly is a standing reproach, to the English Legal Profession, that it lacks any Association whatsoever possessing kindred aims and objects. Not only are we without any publications of the kind now before us, but there is not even a single periodical emanating from the English Press which can be said to supply the place of the *Bulletins*, *Annuaire*s and *Revue*s of Foreign Municipal Law and International Law, such as issue from the chief centres of Civilisation on the Continent. We ourselves have done and continue to do what we can, as the oldest Quarterly Review of Jurisprudence in our country, to discuss Juridical theories and principles from a Foreign as well as from a National stand-point, and to publish translations of important Foreign Laws and Judgments. But we must of necessity, like any other such *Review*, give our principal attention to questions of National rather than of International import. The general periodical Literature of the Legal Profession is represented by publications which may fairly, we think, be said to appeal to a class whose range of reading rarely extends beyond the most recent Practice cases, and for

whom the latest *dicta* relative to Costs are of paramount and all-absorbing interest. If further evidence were wanting of the apathy displayed by English Lawyers towards the study of Foreign Law, a glance at the bookshelves of our chief Law Libraries, and the absence of the very titles of Foreign works from the catalogues of our chief Law Booksellers, would amply supply it.

Whence, then, arises this neglect, and to what is it attributable? Is it, as has sometimes been suggested, due to the fact that Englishmen are, as a race, too worldly and practical to spend time and labour over studies which do not bring them speedy pecuniary recompense? Or has it not rather its origin in that insular feeling of contempt for all things foreign which is characteristic of the Englishman? Is it not that, in our own estimation, our Legislators and Jurists are so incomparably superior to all others, both in the standard of Justice which they set up and in their exactness and lucidity of expression, that there is nothing for us to learn from abroad? Have we not seen a leading member of the Profession, in a recent *cause célèbre*, hold up his opponent's client to obloquy because, forsooth, he had endeavoured to put in force a provision of the Law of France, in the capital of that country? So strong a feeling, indeed, seems to exist, that one of the most experienced advocates at the English Bar appears to endeavour to turn it to account, as a potent aid to securing a verdict. And did not, quite recently, our new Chancellor of the Exchequer, in soliciting the suffrages of the electors of St. George, Hanover Square, successfully seek the applause of his cultured supporters by describing a former Legislative proposal as a "*Continental* method, not an *English* method"? Humiliating as the confession may be, it is neither more or less than the truth that we regard our neighbours in so unfavourable a light that we cannot bring ourselves to recognise any advantage

in watching their Legislative experiments. We would appear to look upon them as human beings of so low a moral and intellectual type as to be incapable of inculcating either by precept or example any useful lesson ; and our indifference to the opinions they may have formed of our Laws and their administration has been carried to such a pitch that we ignore them altogether. This, we believe, is the secret which lies at the root of our want of knowledge of Foreign Municipal Law ; and if our surmise be correct, the Legal Profession, despite its often vaunted liberality and independence of mind, stands convicted of a narrow-mindedness unworthy of so great and historically distinguished a Body.

It is almost needless to observe that the task of Messrs. Martinet and Dareste, undertaken under such favourable auspices, has been most creditably performed. Not only are the texts of the Code accompanied by serviceable explanatory annotations and a copious Index, but they are likewise preceded by a Preface, succinctly tracing the course of previous Penal Legislative efforts. The most celebrated of these attempts at Codification was the Draft Code of 1843, which embodied all the principles advocated by modern Criminal lawyers. Had it passed into law, Hungary would have set an example of humanity and enlightenment to all other European countries. Few schemes, even the most recent, have been so thoroughly progressive.

The Netherlands is, perhaps, the sole country which has up to the present time, ventured so far in advance. There was probably not one of the important reforms effectuated by the Dutch Code of 1878 which did not already figure in the Hungarian Draft Code of 1843. Not only was the Death-penalty abolished, but the whole system of sentences was simplified to the fullest extent ; imprisonment, detention (*les arrêts*), or fine, constituting the sole principal punishments. All distinction was abolished between felonies

(*crimes*) and misdemeanours (*délits*), and the categories of offences were reduced to two, corresponding roughly with Mr. Justice Stephen's proposed division into Indictable offences and offences punishable on Summary Conviction. The provisions applicable to Attempts, Conspiracy, and Habitual Criminals were those which are at present almost universally in vogue. Sections dealing with a certain special class of crime omitted from the French Code, such as duelling, and aiding and abetting suicide, were incorporated therein. In connection with Suicide we would remark that Mr. R. S. Guernsey's essay on *Penal Laws Relating to Suicide* (New York: L. K. Strouse & Co., 1883), may be advantageously consulted.

The Procedure of the Hungarian Draft Code of 1843 was designed with a view to publicity, and the value of oral testimony was fully recognised. The right of Trial by Jury was also, to a certain extent, preserved, seeing that the Court of First Instance, presided over by the *Alispán*, was constituted of twelve members, of whom six, elected by the Assembly of the Province, sat for six years as ordinary members, whilst the other six changed every three months, and were selected from a list drawn up for that purpose by the Assembly. Moreover, the decisions of this Tribunal were to have been subject to review, on appeal to a Superior Court. Owing, however, to certain defects in drafting, which would have created some embarrassment in practice, this proposed Code failed to find adequate support, and was superseded by the Austrian Code, which remained in force till 1860. This, having been abrogated, was replaced by nothing of a like description, and hence recourse was had to the ancient laws, the *jus tripartitum* of Werböczy. Penal regulations and Judicial practice varied in each tribunal, and uncertainty reigned supreme. This untoward state of affairs led to the appointment of numerous Commissions, which sat and reported, until, in 1878-9, the

present Codes were promulgated, and finally passed into law in 1880.

The bold reforms which characterised the proposal of 1843 and the Netherlands Code of 1881 are conspicuous by their absence from the present Codes, whilst, on the other hand, signs of greater care in drafting are everywhere apparent. The Hungarian Legislature has not seen its way to abolishing the Death penalty, nor has it adopted a simplified scale of sentences. The distinction between crimes and delicts is still maintained, as well as the system of *minimum* sentences, and although there are some modifications in point of detail, the general lines on which previous legislation is based have been pretty closely followed. The Codes which have been principally selected as models are those of Baden, 1845, Saxony, 1855, Bavaria, 1861, Belgium, 1867, Germany, 1870, and those which, at the time, it was proposed to introduce into Austria and Italy; besides which, the penal principles enunciated in the Codes of other countries, notably those of France, have been largely laid under contribution. It would occupy more space than is at present at our disposal were we to enter upon a detailed examination of the provisions of the new Hungarian Codes, or those interesting questions relating to provocation, instigation, accessories, attempts, and non-culpability by reason of infancy or weakness of intellect, for a discussion of which we must therefore refer our readers to the instructive Preface, and to the observations which are scattered throughout this useful volume.

A word or two, however, may well be said regarding Procedure, and the Constitution of the Courts. Respecting the former, it is to be observed that it remains in the same condition as before the present Code became Law in 1880; that is to say, it has not been reduced to a Code, being still regulated by (1) certain rules established by the Conference of 1861; (2) an Ordinance of the Minister of Justice

of August 15th, 1880, dealing with the Penal Procedure of District Tribunals ; (3) an Ordinance of the same Minister of August 17th, 1880 ; and (4) an Ordinance of November 5th, 1868, regulating Summary Procedure. It may therefore be said that Procedure in Hungary has not emerged from its unwritten stage, being still principally governed by usage and Jurisprudence. As a consequence, there is much confusion, although there is a tendency to uniformity of practice by reason of the Government having, since 1872, urged the Courts to conform, provisionally, to the Code prepared by M. Csémégi, which, however, is still awaiting Legislative sanction. We cannot dwell upon this branch of the subject more than may suffice to mention that Trial by Jury is excluded, save in Press cases, and that though the Trial is public and oral, the Preliminary Examination is conducted in private. In reference to the constitution of the Courts we are told that there are a District Tribunal and a Court of Justice sitting as Courts of First Instance. The former is presided over by a single Judge, and although the Court of Justice is of superior jurisdiction to the District Court, it is not, in principle, a Court of Appeal, the competency of each being regulated by the gravity of the offence. An appeal lies to one of the two Royal Courts at Buda-Pesth, and the decisions of these are subject to review by the Supreme Court. In conclusion, a fact should be mentioned, the announcement of which will probably be received with very opposite feelings by different schools of Publicists. Chapter II. of the new Hungarian Code, dealing with the territorial and personal jurisdiction, contains the following significant provision :—" The Rules concerning Extra-territoriality shall be determined by International Law ! "

It would seem that in Hungary, at least, the champions of " International Jural Relations " had better look to their laurels !

Not the least useful portion of the labours of Messrs. Martinet and Dareste consists in a bibliography of the Hungarian Codes, and of Text Books on Criminal Law published in various languages, an addition of great value to the student of Comparative Legislation.

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Extradition with the U.S.A.

The Convention with the United Kingdom, recently signed on behalf of the United States by their Minister at the Court of St. James's, but still pending before the United States Senate, recalls our attention to the serious nature of the problems which arise for solution in every proposal for a fresh Extradition Treaty or Convention.

That the Treaty of 1842 between Great Britain and the United States had long since become inadequate to modern ideas and modern needs, was a point which there could be no doubt would find ready acceptance on both sides. The difficulty lay in providing the remedy, and in getting both sides to accept it when found. This, it may be feared, is not yet the result of the statesman-like, and to a certain extent successful, endeavours of Mr. Phelps, as reported in *The Times* (Weekly Edition for 23rd July, 1886).

The language in which the U.S. Minister explains his views to his Government, is pre-eminently the language of sincerity. It is obvious that His Excellency has felt the gravity of the position, and the necessity for a remedy being applied to a state of things which had long been acknowledged as requiring alteration and amendment. Mr. Phelps is not, it would appear, in favour of multiplying Extradition offences, and to this extent he takes up a position somewhat different from that which Diplomats generally have thought it necessary to adopt, in treating this question. We are inclined to think, on the whole, that Mr. Phelps is right, and that Extradition Treaties have of late years been

far too crowded with lists of offences, not a few of which do not seem to carry on the surface the note of true Extradition offences. Not every offence against Municipal Law is rightly the subject of a clause in an Extradition Treaty.

It is, indeed, chiefly to the over-anxiety, as we think it may well be called, to include as large a list as possible of Extradition offences, that Mr. Phelps attributes the want of success which has hitherto attended all attempts at amending the acknowledged deficiencies of the Treaty of 1842. This seems in itself sufficient reason for the moderate attitude taken up by the present American Minister, and that moderation deserves recognition, whether the vigorous attempt which he has made to bring the protracted negotiations to an issue be crowned with success or not. As far as the two Governments are concerned, the success is achieved, and will remain as a landmark in the history of the controversy, and a memorial of the energy and devotion of the Minister who signed the Convention, whether the Convention itself be ultimately ratified by Congress or not.

The multiplying of Extradition offences has long been noticed as a sign of the times by those who take an interest in these questions. In a Paper read before the Association for the Reform and Codification of the Law of Nations at The Hague, in 1875, the eminent Dutch Penalist, A. A. De Pinto, spoke of modern Extradition Treaties as having a tendency to include "all offences of a slight character when committed *dolo* (tous les délits quelque peu sérieux commis intentionnellement,—*dolo*).” The great object of Penal Law being, as M. De Pinto truly observed, to protect Public Order, Public Security, and Public Morality, the main question with regard to any particular Extradition Treaty or Convention is whether the proposed clauses attain those ends by proper means, that is to say, by not including, even for a desirable end, offences which do not properly fall under the category of Extradition offences.

The object of the introduction into the proposed Convention with the United States of the clause in Art. 1, specifying as an Extradition offence, "Malicious injuries to property whereby the life of any person shall be endangered, if such injuries constitute a crime according to the laws of both the high contracting parties," is well known in fact, though it does not appear on the surface. It was certain that the object would be seen by the persons whom the clause would be likely to affect, and that many who had no real sympathy with them would yet, from local political needs, or supposed needs, in all probability support an opposition to the Convention. This opposition is already a fact, and we only note it as such. We have nothing to do with the internal affairs of the United States, and we do not pretend to dictate to them what their policy should be. But we do think that, whatever the decision of Congress, it ought to be recognised in the United States that the desire of those who drafted the Convention was the same on both sides, and that any differences were on pure matters of detail. The United States Minister expressly names certain points on which he yielded because he saw that they were mere details, or surplusage, and either involved no principle, or a principle admitted in general terms by both parties. We think, indeed, that there is a vagueness in the new clause which is to be regretted, as it is generally over vague clauses in a Treaty that disputes and difficulties are apt to arise. But the sincerity of both parties to the Convention is, we think, transparent; and they are at least entitled to the credit of their honesty.

It is interesting to note the opinion expressed by Mr. Phelps on Art. V. of the Convention, providing that the person extradited shall not be tried for another than the Extradition offence, until he shall have had the opportunity of returning to the State by which he has been surrendered. This article the U.S. Minister declares to be not only "right

in itself," "but in conformity with the true principle of International Law in this respect," and "specially desirable for the United States." There is no doubt that if the Convention be ratified by Congress, a considerable field of possible controversy between the two countries will be avoided in the future, and their closer friendship with each other be thereby promoted. On the general question of the true note of an Extradition offence, we would like, in conclusion, to draw upon the wealth of suggestiveness contained in the Minister of State Mancini's *Green Book on Extradition*, to which attention has already been called in this *Review*. We there find it put on record (*Atti della Commissione Ministeriale sulla Estradizione*. Roma. Tip. del Ministero. 1885) under the head of the criterion for judging whether an offence is an Extradition offence, that "Extradition is founded on the duty and interest which all nations have in not leaving unpunished offences against the natural rights of man." We have, therefore to consider, and to commend to the consideration of our kin beyond sea, the question whether the right of property and the right of existence are among the "natural rights of man." We apprehend that on neither side of the Atlantic does the doctrine prevail which is embodied in the famous epigram—"La propriété, c'est le vol." If, on the contrary, both sides consider property to be one of the rights of man, it is for both sides to agree in a formula which shall not only protect the right of property, but also, which is a much more serious need, the right of existence.

Since the above was written, we learn that a Convention with Canada, drafted by Mr. Phelps and Lord Rosebery, has been superseded by a fresh Draft, acceptable to Canada. We do not at present know what were the points unacceptable to Canada, and we shall hope to obtain further information such as may enable us to compare the two Drafts in a future number of this *Review*.

Foreign Judgments.

We are reminded by the appearance of a *Second Appendix* (W. Clowes & Sons, Limited) to *Chap. VIII. of The Law and Practice Relating to Foreign Judgments*. By F. T. PIGGOTT, M.A., LL.M., Barrister-at-Law (Second Edition. W. Clowes & Sons, Limited), of the wide-spread interest attaching to the subject of Mr. Piggott's valuable Treatise, and of the great desirableness of securing further action in the important questions with which it deals.

That the subject is of very great importance to the Commercial world is admitted on all hands. That some action should be taken to obtain at least a delimitation of the points really at issue, is probably denied by no State and by no Jurist. That the points really at issue would, on a calm and independent review of the whole question, be found to be narrowed within a very small compass, we believe would be the result of any conference of Jurists which might be summoned to consider the subject. That some such conference, as a preliminary, and certainly a desirable, if not actually a necessary, preliminary to a Diplomatic Conference or Congress, ought to be summoned, probably few Jurists or Statesmen would deny.

And we know that such a view, or something very like it, has long been in the mind of the distinguished Italian Minister, Mancini, to whose untiring zeal and devotion we owe the clearing of the way for the discussion of the subject, through his official correspondence with the principal States alike of the Old and of the New World (for an account of which see *Law Magazine and Review*, No. CCLVIII., for November, 1885).

When so much has already been accomplished of the necessary preliminaries, when so many Governments have been brought to acquiesce at least in the desirableness of a solution being found for a problem which has long baffled solution, it is surely time that the one step forward which

yet remains should be taken. That step clearly, to our mind, is the summoning of a preliminary Conference of Jurists, to pave the way for the subsequent meeting of Diplomatic representatives of the Nations interested, who should place the official seal to the labours of the Jurists.

For such a Juridical gathering as we here sketch out, no fitter seat could be found than Rome, no fitter President than Pasquale Stanislao Mancini.

We know that his counsel is sought by his Sovereign in times of Ministerial crises such as recently occurred in Italy. We know, also, that His Excellency's single-minded devotion to the highest interests of Mankind, to Peace and to the brotherhood of the Nations of the World, cannot fail to be appreciated wherever the name of Mancini is mentioned. We feel, therefore, that it would be a fitting crown to his life-long labours in the cause of Humanity if he were permitted to carry out his long-cherished hope of seeing the Nations come to an agreement on the ever-recurring vexed question of Foreign Judgments. The Minister of State, Mancini, is now advanced in years, but he is still young in the vigour of his mind. He has reached the evening of his life. But we may be permitted in once more returning to the charge in our advocacy of his views, to repeat, in connection with the subject of Foreign Judgments, and the name of Pasquale Stanislao Mancini, the prophetic words with which we conclude: *Vespertino erit lux.*

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Law and Finance in the United States.

American Finance and American Law are both interesting subjects to the English Legal Profession, whose members are not unfrequently called upon to deal with them, and in all probability have to acquire their knowledge when they receive their instructions. It would be well for all who may

be likely to need such knowledge, whether professionally or for personal reasons, if they were to study carefully the contents of a handy volume bearing the unpretending title of *An Investor's Notes on American Railroads*, by JOHN SWANN, M.A., Oxon., Counsellor-at-Law (G. P. Putnam's Sons: New York and London. 1886).

Mr. Swann's position as sometime General Manager of the Alabama Great Southern Railroad, has afforded him facilities for becoming acquainted with the practical working of the American Railroad system, while his position as a member of the Bar has enabled him to appreciate the Legal points which require to be set clearly before Englishmen and Americans alike in connection with that great branch of American Commerce which forms the subject of his discussion. In eighteen generally brief but telling chapters, with a chapter by way of Appendix, containing extracts from the Constitution of the State of Georgia relating to Railroads, and the general Railroad Law of the State of Massachusetts, Mr. Swann deals with a number of points very necessary to be rightly apprehended on both sides of the Atlantic. Incidentally he is led to open up certain questions which are frequently pressing upon the Legislatures of our own and other European countries. Is it or is it not beneficial to the workman and to the State that the hours of labour should be restricted by Legislation? Mr. Swann, on the whole, decides in the negative, and we think he decides rightly. "To limit the hours of labour," says Mr. Swann (*op. cit.*, p. 16), "is to 'level down' the skilled artisan against his will." He is of opinion that the champions of the Socialist school are preparing the downfall of England's Commercial Supremacy. It seems to us very probable that those champions do not care anything about England's Commercial Supremacy, but only care to obtain a temporary triumph, at whatever cost to the Nation. The doctrines which they urge, Mr. Swann

is careful to note, are not at all the doctrines of Cobden and Bright. Happily Mr. Bright is still amongst us to bear witness to the difference, wherever he traces it, between the doctrines which he has spent his best years in promoting, and those which a radically different school would in vain persuade us are the Political and Economical doctrines of Cobden and Bright. Mr. Swann's book should be read with interest, in England, no less than in the United States.

Reviews.

De l'exercice illégal de la Médecine et de la Pharmacie. Législation Pénale et Jurisprudence. Par M. G. DENIS WEIL, Juge Suppléant au Tribunal de la Seine. Paris. Marchal et Billard. 1886.

In taunting M. Dalloz with allowing his opinions to be influenced by considerations of sentiment appropriate to the poet and the moralist, though wholly out of place in the case of the juris-consult, M. Denis Weil, the author of a recent valuable French treatise on Medical Jurisprudence, puts his finger upon a blemish which not unfrequently disfigures the Legal Treatises of his compatriots. The temptation to rhapsodise on every possible occasion seems too strong to be resisted by the generality of Frenchmen, be they philosophers, historians, or even lawyers, and it is therefore the more refreshing, because unusual, to come across a work like the present, which, whilst offering unquestionable opportunities for rhetorical display of the approved pattern, is nevertheless conceived throughout in a perfectly calm, temperate, and judicial spirit. Moreover, M. Denis Weil is to be congratulated not only upon his exercise of self-restraint in this direction, but also for not having fallen into the opposite extreme.

The work opens with a historical description of the rise and growth of French legislation affecting Doctors of Medicine and Surgeons, which presents several points of antiquarian interest, not the least being the quarrel between these two branches of the profession, the defeat of the latter culminating in their

humiliating enrolment in the Guild of Barbers! Upon what precise grounds this heterogeneous affiliation was enforced M. Denis Weil does not hazard an opinion, and, in its absence, we might perhaps venture to suggest that it had no better *raison d'être* than the common employment of the knife. Be this as it may, a connection which was barbarous in more senses than one continued to exist from the end of the 16th century till 1743. Additional interest might have been imparted to this retrospect if M. Weil had noted that in England, also, the barber's craft was in early times conjoined with the art of surgery, that the Companies of Barbers and Surgeons of London were, in the year 1540, by the Statute 32 Hen. VIII., c. 41, united and made one body corporate, and that it was not until the year 1745 that barbers and surgeons were, by the 18th Geo. II., c. 15, separated into distinct corporations.

Instructive as are the topics discussed in the chapters which follow, they do not belong to the special scope of our pages. We must, therefore, content ourselves with mentioning that the work is divided into two parts, wherein are described the qualifications and formalities requisite in France for the practice of medicine, including surgery and pharmacy, the exercise of those professions by unauthorised practitioners, and the Civil and Criminal liability which such illegality entails. M. Weil has, however, not rested satisfied with an account of the laws of his own country relative to this subject, but has availed himself of such sources of information regarding recent Foreign legislation as were readily accessible to him through that excellent work, the *Annuaire de Législation Etrangère*, published by the Society of Comparative Legislation in Paris, and other kindred publications. We even find him, in his advocacy of the employment of women as votaries of the healing art, referring to the *Times* newspaper for an account of the beneficent operation of that philanthropic movement in India, under the auspices of the Countess of Dufferin, which has for its object the providing of feminine medical aid for those of our Indian fellow-subjects of the female sex who are prohibited by religion or rigid custom from accepting the ministrations of men. Drawing our own information from the same source as M. Weil, we observe in the issue of January 11th, 1887, the announcement that the Paris Medical Faculty has this year 108 female students, viz., 83 Russians, 11 English, 7 French, 3 American, 2 Austrian, 1 Turkish, and 1

Armenian. It is, indeed, a strange commentary upon our nineteenth-century civilisation, enlightenment, and vaunted freedom from prejudice, that the medical schools and examining bodies of Europe, with the exception of those of Paris, the King's and Queen's College of Physicians in Ireland, the University of London, and, we believe, the University of Zurich, and possibly others in Switzerland, should be closed to women, as unsuited for the exercise of the profession of medicine by reason of their sex.

M. Weil very properly deprecates a state of the Law which tolerates the practice of the art of Dentistry by persons who have never qualified themselves for it, and he at the same time draws attention to the Laws of Holland and Germany, which contain the necessary prohibitions.

Coming now to the second part of the work, which treats of Apothecaries, it can hardly be conceded that there was more semblance of reason for Philip IV. and John of France incorporating Druggists and Grocers in one Guild, than for the linking together of Doctors and Barbers. At any rate, such was the case, and this extraordinary fellowship was maintained until 1777. M. Weil might here, too, have pointed out that a similar fate befel the Apothecaries of London when, in the year 1606, they were by Letters Patent of James I. united with the Company of Grocers; but, more fortunate than their French *confrères*, the incongruous partnership was dissolved 11 years afterwards, the Apothecaries receiving a new charter constituting them a separate Company, under the designation of the "Master, Wardens, and Society of the Art and Mystery of Apothecaries of the City of London."

Whilst perusing that portion of M. Weil's book devoted to an exposition of the French law relating to the sale of drugs, poisons, and patent medicines, we are reminded of the need for amending our own Legislation on this subject. We have before now called attention, in the pages of this *Review*,* to the dangers to which the British public is exposed by reason of the imperfections in our present statutory enactments, and to the urgent necessity for some comprehensive measure embodying the views of those who have considered the best means for remedying the evils from which we are at present suffering. Recent applications to our Metropolitan Magistrates, and

* *Law Magazine and Review*, No. CCLIX. for February, 1886, pp. 200-204.

circumstances which have come under our own notice, shew strongly the dangers, no doubt unsuspected by their founders, which are felt through the action of that modern development, the Co-operative Stores. It seems evident that the Drug Department of these Institutions considers itself to be freed from the ordinary restraints of the apothecary's dispensing routine, to an extent which threatens serious evil to the Community. It is much to be hoped that as soon as the Parliamentary machine, at present sadly out of gear, is again got into sufficiently good working order to undertake domestic legislation, this serious requirement may not be overlooked.

An Abridgment of the Procedure Acts passed by the Supreme Courts in Scotland. By EDWIN ADAM, M.A., LL.B., Advocate. T. and T. Clark, Edinburgh. 1886.

This very useful, and at the same time, interesting and instructive volume consists of two parts or divisions. In the first are given the Acts of Sederunt of the Lords of Council and Session, from January, 1852, to October, 1886, so far as in force. It is thus a continuation of the well-known *Abridgment of the Acts of Sederunt*, published in 1852, by Mr. Alexander, in his second *Supplement*. The first part, therefore, supplies a long felt want in the profession, and will, no doubt, be welcome and highly appreciated by the legal profession in Scotland. The second part consists of the Acts of Adjournal of the High Court of Justiciary in Scotland, so far as in force, and contains, like the first part of this book, some useful and curious information which cannot fail to be interesting also to legal practitioners in England. The Lords of Council and Session, as the Judges of the Supreme Court in Scotland, exercise very high and important duties in regard to the administration of Justice in Scotland, and discharge somewhat similar functions to the Council of the Judges of the High Court in England, and they have often had entrusted to them, and frequently exercised, high and important Legislative duties under certain Acts of Parliament as to Procedure and Forms of Process. These latter have, for example, been exercised under the Scotch Bankruptcy Act of 1856, as to the duties of Judicial Factors on the estates of persons deceased, and also as to the regulations made for appointing Procurators or Solicitors for the Poor in the Sheriff or County Courts of Scotland.

With regard to the latter, the regulations are of such a nature as to give all poor persons the assistance of Solicitors without fee or reward, in all Civil and Criminal Actions in the Sheriff Civil or Criminal Court, and also in the Justiciary or Supreme Criminal Court of Scotland. It may be interesting to our readers here to observe that similar regulations exist in Scotland to give poor litigants and criminals the legal assistance of Advocates and Solicitors of the Supreme Court. Why should not such regulations exist and be enforced in England? In Scotland, the Lord Advocate discharges the functions of an English Grand Jury in criminal matters. He is also the Queen's Public Prosecutor, and Queen's Coroner. Aided by qualified Depute Advocates, he, in private, conducts his preliminary proofs against prisoners. As soon as a criminal charge is made, the private person injured has nothing to do with the matter; and all subsequent criminal proceedings are undertaken by public officials of the Supreme and Inferior Criminal Courts, and at the expense of the local ratepayers, or of the national exchequer. In these Acts of Sederunt will also be found regulations as to the attendance and non-attendance of counsel at motions and trials, and the means which have been adopted when the litigants wish the matters to be proceeded with as if no absence or negligence had taken place. For example, where the counsel of one side are absent when called on, the counsel of the other side, when present, may ask for Judgment or request the Judge to place the case at the bottom of the Roll; and, when the counsel of both sides are absent, the Judge may dismiss the action without giving costs to either party. In the second part of this book there will be found a regulation, as early as 1680, by which the Lords of Justiciary, who are the Supreme Criminal Judges of Scotland, and are also Lords of Council and Session, ordained that an accused person should give intimation of Letters of Exculpation, to be obtained from the Clerk of the Court before which he would be tried, and should therein give a list of the whole of the witnesses who were to be produced at the trial in his defence. By a subsequent regulation, made in 1827, applicable to the Sheriff and Burgh Courts of Scotland, all articles to be founded on by the accused in the course of his trial, and a list of the witnesses for the accuser and accused had, in ordinary practice, to be produced to the Clerk of Court before the trial, and without special leave of the Judge, no other

productions or witnesses could be produced or examined on the trial for or against the prisoner. Such regulations are highly useful, and exclude that ignorance of what is going to take place, and the hap-hazard of Criminal Trials in the Supreme and Inferior Criminal Courts of England. In Scotland, a prisoner, in all serious cases, has to be served with a copy of the indictment against him several days before his trial; and he, therefore, knows fully what is the charge which is to be brought against him, the witnesses who are to be produced against him, and the names and designations of the Jury who are to try him. Letters of Exculpation are issuable by the Court in which a prisoner is to be tried, for the citation of witnesses and raising objections to a Scotch Indictment, which latter is sometimes called a Criminal Libel, and sometimes gets the name of Criminal Letters. Formerly, in Scotland, and down till the Scotch Statute of 1696, c. 15, indictments, like all other deeds, were written on one side only, and the sheets of paper were fastened together. By the Act of 1696, they were authorised to be written bookways. By an Act of Adjournal, in 1773, the Lords of Justiciary abolished the office of Dempster, because it often gave rise to unnecessary adjournments in "sentences of death," and because "in " this most solemn act of Judicial Procedure, intended to strike " the minds of the audience with awe, the absurdity, drunkenness " or ignorance of the person performing the office of Dempster " so often invert that solemn act into a scene of derision and " absurd laughter amongst the lower class of the audience, to " the great offence of the Judges and every thinking person."

Mr. Adam's book has an admirable index of subjects, which enables the reader to find out what it professes to give. It is a worthy sequel to Mr. Alexander's *Abridgment and Supplements of the Scotch Acts of Sederunt*.

The Bankruptcy Act, 1883, and the Bankruptcy Rules and Forms, 1886; with Notes. By WILLIAM HAZLITT, Esq., Senior Registrar in Bankruptcy, and RICHARD RINGWOOD, Esq., M.A. Second Edition. By RICHARD RINGWOOD, Esq., M.A., Barrister-at-Law. Stevens and Haynes. 1887.

The second edition of the book, in the preparation of which Mr. Ringwood acknowledges his indebtedness to Mr. Sidney Woolf, for many valuable suggestions, and also to Mr. R. D. Curtler, B.A., for the Table of Cases and Index, is certainly

published at a very opportune moment. The new Rules, which have recently come into operation, do not differ from those which they supersede in demanding, as all Rules probably ever will demand, an expenditure of time and labour for their due comprehension and construction which the busy practitioner is seldom able to afford. Hence the usefulness of explanatory notes and comments, such as are contained in the present volume. In every case of importance the actual words of the Judgment are given, in order to obviate the necessity of always having Reports at hand, and, being compiled in a concise form, this conveniently-sized volume will no doubt meet with the success it merits. The new Rules and Forms have been noted up under the various sections of the Act, and all necessary cross-references have been inserted; but the notes, being one of the most essential features in a work of this class, should undoubtedly have been printed in rather larger type, so as more quickly to catch the eye. A comparative table is given, shewing in what respects the present correspond with the old Rules and Forms, and how far they are altogether new. The arrangement of the Table of Cases, containing as it does references to the Reports of the decisions is to be commended, and, having examined not a few we are able to speak to the general accuracy of their citation. It would, however, have facilitated reference if, when a case appears under two headings, the reference to the Report had been given in both instances. The new edition, with its copious index, bears evidence that no labour has been spared to render it a thoroughly trustworthy manual of the present practice in Bankruptcy.

The Supreme Court Funds Rules; New Order as to Court Fees, and Rules as to Examiners of the High Court. By M. MUIR MACKENZIE and C. ARNOLD WHITE, Esqrs., Barristers-at-Law. Stevens and Sons. 1884.

This work is a complete repertory of information as to the changes and working of the new Regulations in the Office of the Paymaster of the Supreme Court. The Introduction by the authors gives a clear and succinct account of the alterations made in the great Receiving and Paying Department of the High Court since the Royal Commission of 1864, and indicates the prominent changes which have been made in the practice of the Paymaster's Office. These may briefly be indicated as referring to the uniformity which has been

enforced under Lord Selborne's Rules, Schedules and Orders of 1884. After much labour, the greatest simplicity has now been introduced into the Paymaster's Office, and the fullest and most detailed information required by the public, or the Legal Profession, will be found in this most useful work. A new and admirable feature in the New Rules is found in the arrangements made for the receiving and paying of money, both capital and dividends, by post, and dispensing with the old rule necessitating personal attendance for those purposes.

A Concise View of the Law of Landlord and Tenant, including the Practice in Ejectment. By JOSEPH HAWORTH REDMAN and GEORGE EDWARD LYON, Esquires, of the Middle Temple, Barristers-at-Law. Third Edition. Reeves and Turner. 1886.

That three editions of this work should have been issued within ten years affords a surer criterion of its usefulness than any amount of laudatory criticism. It is essentially a book wherein the busy practitioner will readily find material for forming an opinion upon every branch of the law governing the relationship of Landlord and Tenant, as it at present exists. Since the publication of the last edition, the Conveyancing Acts, 1881 and 1882, the Settled Land Act, 1882, the Ground Game Act, 1880, the Agricultural Holdings Act, 1883, and the Bankruptcy Act, 1883, not to mention numerous other Statutes of minor importance, and Rules of Court, have passed into law. These have been incorporated in the volume, together with an accurate Digest of some hundreds of cases, including the most recent decisions, thereby, of course, somewhat increasing its bulk. Notwithstanding this, we are fully prepared to concede that the original claim of the authors to conciseness has not in the smallest degree been sacrificed. Not the least recommendation of this handy treatise is its copious Index, which we note has undergone considerable amplification. One point we would notice in connection with the singularly accurate summaries of cases, even the most recent, which are to be found within the pages of Messrs. Redman and Lyon's work, is the case of *Clarke v. Millwall Dock Company*, a decision which, on appeal, had evidently not been reported in the *Law Reports* before this work issued from the press, as may be judged from the author's sole reference to 30 S.J. 499. The principle of law deduced by Messrs. Redman and Lyon, viz., "that where chattels are in course of construction upon such terms as in that case are

disclosed, the exemption from distress applies until completion and constructive delivery to the purchaser," is, in our opinion, unimpeachable on any ground whatsoever ; and the soundness of their judgment deserves the more attention from the circumstance that the head-note to this case in the *Law Reports* is likely to mislead. Altogether, we do not hesitate to express the opinion that the present edition fully maintains the reputation of its predecessors, and that it would be hard to find a better book upon this familiar branch of the Law.

A Treatise on the effect of the Contract of Sale. By LORD BLACKBURN. Second Edition by J. C. GRAHAM, of the Middle Temple, Barrister-at-law. Stevens and Sons. 1885.

We cannot say that Mr. Graham's edition of Lord Blackburn's little book on "Sales" appeals to us as supplying any felt want. Its issue seems to be so entirely the result of rivalry between publishing houses that it is impossible to give it so cordial a welcome as the honest labour bestowed on it would ordinarily have entitled it to receive at our hands. We make these remarks notwithstanding the fact that Mr. Graham has published his book with Lord Blackburn's permission, which we presume must be taken to mean with that eminent and learned Judge's approval, for we always imagined that the once standard *Blackburn on Sales* had lost its identity, and had long ago been merged in the now almost authoritative *Benjamin on Sales*. The publishers have nevertheless decided to revive the famous little text-book, and have sent a second edition of it forth in newer guise and larger fashioning, and it is our duty, therefore, to judge this issue on its own merits, and irrespective of the fact that the third edition of *Benjamin* already occupies a goodly place on our shelves. Mr. Graham's work, then, is well and thoroughly done ; if we must select one part of it for especial praise, it is the chapter on "Equitable Interests and Assignments," which is excellent, and which the presence of unsightly brackets (in this book more unsightly and "wrong-fount" than ever ; but the custom itself is one which might well be abandoned as soon as possible) indicates to be Mr. Graham's own. And if we are to select another part of his book for especial blame, it must be the unnecessary amount of padding which the extracts from Pothier supply : surely, small type might have sufficed for these. While, too, we are pleased to find Mr. Graham making little original excursions into the realms of Jurisprudence,

too often considered haunted by modern text writers, we are simply amazed by the extraordinary position taken up in the section on the "Operation of Contract in English Law," to the effect that a contract of sale gives rise to a *jus in personam* as between the parties to the contract, and to a *jus in rem* only when the property in the goods sold has passed to the purchaser. What Mr. Graham means to say, we presume, is that, so far as the property in the goods is concerned, there is no *jus in rem* until it has so passed; but he gives a much wider proposition, in which he ignores the fact that every contract gives rise to a *jus in rem*, entitling either contracting party to protection against disturbance by anyone in the rights which accrue to them under the contract, whether those rights are rights to property or only to future possession of property, or any other rights whatever. Mr. Graham is too sound a lawyer to need any reference to the cases which support this, not only as a proposition in Jurisprudence, but also in Law.

Emden's Complete Collection of Practice Statutes, Orders, and Rules, from 1275 to 1886. 2nd Edition. Stevens and Haynes. 1886.

This work, in its present enlarged form, comprises 1397 pages, filled with closely printed matter very valuable to the practitioner. That the second edition should have followed so quickly on the heels of the first speaks volumes ("all very fine and large" ones too) for its utility, and for its filling a want, which indeed had long been felt. The praise readily accorded by us to the first edition we cordially repeat and bestow on the second: and also, we are sorry to say, the blame. The bulk of Mr. Emden's work must ever operate as a practical deterrent to its frequent use in chambers. As we said before, so we say again, in order to make it a really serviceable book, the Judicature Acts (or at least the rules and orders) and the Bankruptcy Act should be omitted, or bound in a separate volume. However complete the work may be with regard to other statutes and decisions thereon, the part which is devoted to these two Acts can never be so complete as the books already on our shelves which deal exclusively with them. The additional two thousand cases introduced in the new edition add little to its use in this respect, for the ground is already so fully covered, the practice cases are already so fully explained, that it appears to us sheer waste of printers' ink and paper to print the references to them over and over again.

The Principles of Equity. By EDMUND H. T. SNELL, Barrister-at-Law. Eighth Edition. By ARCHIBALD BROWN, M.A., B.C.L., Barrister-at-Law. Stevens and Haynes. 1887.

We greet with pleasure the Eighth Edition of this popular and successful work. It is satisfactory to notice that the Editor has produced it without the supplementary part containing the Practice, an omission we have long thought desirable. The original *Snell* contained no Practice; it has won its reputation as a work on theoretical Equity—being a Treatise on the Principles and not on the Practice. Besides, seeing that the work, as enlarged, contains, reckoning the Index, 844 pages, the addition of the Practice would make it too bulky for a single volume. The last edition contained in all 951 pages, 630 being devoted to the Principles, 182 to the Practice, and the rest to the Index.

We desire to take this opportunity for offering one or two suggestions as to other possible improvements. We have always thought that the law as to Voluntary Trusts is too profusely illustrated and dealt with too minutely, and tends to confuse beginners. For instance, great stress is laid on the distinction between property assignable and not assignable at law. On page 70 it is stated that, owing to the Judicature Act, 1873 (which was not passed when the original edition was written), and other Acts, the distinction is rendered unnecessary; but the cases are still quoted because the principle of their decisions is not altered. True, but it is puzzling the student on a matter of second-rate importance, and the space occupied might be more usefully devoted to other matter. For instance, we can find no mention of heirlooming chattels, and how far they can be tied up with the land; a point often asked in Examinations.

Under Express Trusts (p. 100) is stated the law in those cases when there is an absolute gift with precatory words. Mr. Lewin and some other writers place this head under Implied Trusts. The point as to the head under which it is placed is not of much importance, but it is a pity the various works are not uniform in their classifications. Students often read two or three books at a time (a bad plan, we think), and thus are apt to fall into confusion.

Again, on page 111—it was scarcely necessary in a first work still to cite Lord Cranworth's Act, 23 & 24 Vict., c. 145, seeing that it has been repealed five years or more.

On p. 126 we note yet another difference in classifications from some other treatises. Resulting Trusts are included under

Implied Trusts, as arising by "intention of the party creating" them. Lewin states that a Resulting Trust arises by operation of law, and is thus distinct from an Implied Trust. We do not for a moment assert that Mr. Snell's view is not the correct one, but we regret these conflicting views for the sake of the student. Again, Ch. VI. on Trustees, is not sufficiently full, considering the importance of the subject—but the passage on their Duties and Discretions (p. 157) is very well put. At the end of chapter VI., p. 192, there is no mention of the extension of the Trustee Relief Act by the Judicature Act, 1873, s. 25, sub-s. 6. On p. 225 the case of *Curteis v. Wormald*, overruling *Reynolds v. Godlee*, should be more clearly stated. The chapters on Election, Satisfaction, and Performance are very lucid and complete, and appear incapable of improvement. Under Administration, on p. 321, in the order of liability of different properties to debts, there is no place assigned to *donationes mortis causa*. The notice of an attornment clause in a mortgage deed and the recent cases bearing on it, we regret to find extremely meagre, the case of *Hall v. Comfort* (W.N. 68, S.J. 29) not being noticed at all. There is nothing said about s. 10 of the Limitation Act, 1874. The law as to Partnership has been enlarged, but we miss allusion to the power of a vendor of the goodwill or retiring partner to solicit old customers. As a whole, *Snell's Equity* has been greatly enlarged and improved by its editor, and probably constitutes altogether the best compendium of Equity in our language. As a concluding suggestion, we may say we should like in the next edition to see the Leading Cases, with their facts shortly stated, placed in large type at the commencement of the subjects they respectively deal with, as is done in Mr. H. A. Smith's *Principles of Equity*, and briefer accounts of the less important cases.

We are glad to observe that the chapters on Administration, Mortgages, and Specific Performance are extended, as these are subjects frequently specially set in the Equity paper of the Bar Examination. On Specific Performance and Mortgage there is no small book suitable for the student. There are, of course, the well-known Treatises of Coote, Fisher, and Fry, but students will not toil through such ponderous tomes, Now, the chapters relating to these subjects being enlarged, *Snell* will be almost sufficient, if supplemented by the notes to *White and Tudor's Leading Cases*.

A Manual of the Principles of Equity. By JOHN INDERMAUR, Solicitor. Stevens and Haynes. 1886.

As the number of candidates for the Law Examinations is on the increase, there is no doubt an increasing demand for text-books for students. But of late, surely, the supply has outrun the demand. Amongst large works, besides the well-known *Snell*, there is an excellent treatise by Mr. H. A. Smith, and three smaller works have appeared from the pens of Mr. Underhill, Mr. Shearwood, and Mr. Blyth. Besides which, we have Smith's *Manual*, now in its 13th edition, and a treatise by Mr. Roberts. More works merely flood the market, unless, indeed, the treatment is original, a characteristic which, we think, can only be attributed to the work before us for its division of the subject—a matter of minor importance. The size of the book is unsatisfactory. We presume it is intended chiefly for the Solicitors' Final; since, for the Bar Examination, it is, in our opinion, comparatively useless, as only two or three heads of Equity are set, and these are required to be got up, not superficially, but well. The matter here, on these subjects, is, as it necessarily must be, in so small a work, far too scanty. For the Solicitors' Final, also, we consider it too small. The author suggests that it should be supplemented by *White and Tudor's* or by his own *Leading Cases*; we would rather recommend the student to read a work like *Snell*, and supplement that by one of the three smaller books on Equity.

The work itself is, like the rest of Mr. Indermaur's books, accurately, clearly, and ably written, the chapter on Conversion being especially lucid; we are pleased to find that the law laid down in the case of *Curteis v. Wormald* (p. 214) is concisely stated. But we can find no reference in the Index of Statutes to the Intestate Estates Act, 1884, nor in the body of the work to the important change which the 4th section of that Act makes, and we miss notice of the cases of *Burgess v. Wheate* and *Gallard v. Hawkins*, which it overrules. In the chapter on Election, the fact that the doctrine does not arise in the case of derivative interests is not brought out. In relation to the doctrine of notice, nothing is said about the rule in *Durle v. Hall*, and that it does not apply to real estate, a point frequently touched on in the Examinations.

The only allusion to the Statutes of Limitation appears to be under the heading of Mortgages; we cannot find anything about them in reference to Trusts, an omission which appears to

be common to several works on Equity, and of which we have often heard complaints. Here, as in the new edition of *Snell*, the extension of the Trustee Relief Acts of 1847, 1849, by the Judicature Act, 1873, is omitted.

Under Partnership nothing is said about the important case of *Kendall v. Hamilton*, though we are glad to see *Pearson v. Pearson* is down. We find, as in *Snell*, that the extent to which chattels can be tied down with the land is passed over, a point fully laid down in *White and Tudor's Equity Cases* (under the leading case of *Lord Glenorchy v. Bosville*), from which the author states he has drawn a considerable portion of his material. There are a few other omissions of points which it might be useful to give, and which we hope will appear in the next edition. The salient merit in this as in the rest of Mr. Indermaur's works, is that it is pleasant and easy reading, and may be relied upon in the matter of accuracy. Whether it supplies a special want, may be open to question, on the grounds already stated above.

The Theory and Practice of Banking. By HENRY DUNNING MACLEOD, M.A., Trinity College, Cambridge, Barrister-at-Law, Hon. Member of the Juridical Society of Palermo. Fourth Edition. Second Vol. Longmans. 1886.

The Elements of Economics. By the same author. Vol II., Pt. I. Longmans. 1886.

"*Exegi Monumentum*," may well be Mr. Macleod's words, as he looks upon the volumes of his *Theory and Practice of Banking* which embody so much of the toil and the thought of years. The labour has not been in vain. Whether in his larger or his smaller works, Mr. Macleod has made for himself a place in Economical Science which is filled by no one else in this country, and by few living writers in other lands. For clearness, combined with wealth of illustration no less than with terseness, we do not know of any modern text-writer whose works we could, with the same confidence, place in the hands alike of teacher and of student, feeling that the benefit to either would be equally great in the sweeping away of many a cob-web, and the clearing up of the many difficulties which beset the path both of the teacher and of the student of Economics. It is no easy thing to teach Economical Science, although the words are often on our lips, and we are apt to say glibly that such and such a proposal or action is contrary to the doctrines of Political Economy. If we more frequently stopped to think before speaking, we might

not always be so ready with our invocation of that "*Deus Ex Machina*," Political Economy. The name, indeed, by which the Science is ordinarily known is not a very happy one, and we greatly prefer, with Mr. Macleod, to speak of it as Economics, or Economical Science. The close relations of this Science to the Exact Sciences on the one hand, and to Jurisprudence on the other, are among the features specially brought out by Mr. Macleod in all his Treatises, and it is this which renders them so particularly valuable to the Jurist as well as to the general student of Economics. In his larger work on *Banking*, Mr. Macleod gives us the benefit of his labours in digesting the Law of Credit, Bills, and Notes, as originally undertaken by him at the request of the Royal Commissioners on the Law of Bills of Exchange, Bank Notes, &c. To this important branch of his subject Mr. Macleod devotes about a hundred pages of the concluding volume of his Treatise, and they will, to the practitioner, be not the least useful, as they will probably be the most frequently consulted pages of the book. Yet it were well that the pages leading up to the Digest of the Law of Credit, Bills, and Notes should also be consulted by members of the Legal Profession, especially where they may be chiefly or largely engaged in Commercial Law. Each part, indeed, of the two volumes of the *Theory and Practice of Banking* is so intimately connected with the subject as a whole that it would not be possible to gain an adequate grasp of Mr. Macleod's views without studying the volumes themselves as a whole. It may well be that our piecemeal Legislation, of which complaints are so frequently made, is, to a greater extent than we may imagine, the result of piecemeal study of portions of subjects without adequate apprehension of the whole, and without a due sense of proportion. Much of our Legislation, indeed, does appear to be totally destitute of a sense of proportion, and the evil is, we much fear, a growing one.

In days of so much haste and such ill speeding, small volumes have, we believe, a far greater chance of being read than large ones. It is probable, therefore, that Mr. Macleod's small Treatise on *The Elements of Economics* will find a wider circle of readers than his larger work on *Banking*. Fortunately for the public, they will find in this smaller work a sufficiently full, though a necessarily concentrated statement of the author's views on Economical Science in general, as well as more particularly in its relation to Political Science and to Jurisprudence.

In these latter relations, indeed, the volume now before us, and which constitutes Part I. of the second volume intended to complete the work, is specially valuable at the present moment. For it so happens that this volume contains terse and logical refutations of certain erroneous views of the Land question now being agitated amongst us, to the practical obstruction of nearly all the other functions of our Legislature. What would be the nature of Mr. Macleod's answers, were there to be, as has sometimes been suggested, a Royal Commission appointed to enquire into the Irish Land Question, or any other Land Question that may be brought to the surface in other parts of the United Kingdom, and which should seek information from him as an Economist, the readers of his *Economics for Beginners* are left in no doubt.

"If all landlords were swept away," such is Mr. Macleod's forcible language, "the consumers would receive no benefit. The products of the earth would not be sold the least cheaper. There would be exactly the same Demand and exactly the same Supply, and therefore the value would remain the same. It can make no manner of difference to the consumer whether the whole profits go to the farmer alone, or whether they are divided between landlord and farmer" (*Economics for Beginners*, Vol. II., Pt. I., p. 128). It is obvious, therefore, that from the point of view of Economical Science, as interpreted for us by Mr. Macleod, the abolition of Landlords, so constant a cry in these days, is not only a crime but a blunder. It is well to have the true facts of Economics on such much debated but little understood subjects put before us by a recognised master in the Science, and without any allusion to political shibboleths or party warfare. Nor is this the only case in which Mr. Macleod's writings shew the importance of Economics to the peace and good government of the country. If our labouring classes would only believe that "a solid Banking System multiplies the Wages Fund a hundredfold" (*op. cit.*, p. 141), and that it "provides continuous employment for them so long as there is a prospect of demand for their products," we should in all probability have fewer strikes, and hear little or nothing of the alleged impassable gulf between the interests of Capital and Labour, of Master and Man. If Mr. Macleod had done nothing more than draw attention to these neglected truths of Economical Science he would have deserved well of the State. But he has done much more, and his two Treatises on *Banking* and on the *Elements of Economics* entitle him to the gratitude of the Jurist and of the Statesman, as well as of the Economist.

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I.—PARTNERSHIP IN ROMAN AND ENGLISH LAW.

THE Literature of Partnership in Roman Law is somewhat scanty. It comprises a few passages from the Institutes of Gaius (III., 148—154), dealing with the different kinds of partnership, rules as to shares and methods of dissolution; a separate title of the Institutes of Justinian (*De Societate*. III., 25), amplifying but slightly the somewhat meagre statements of Gaius; a special title of the Digest (*Pro Socio*. D. XVII., 2), which may be said to form the groundwork of the Roman Law of Partnership; a special title of the Code (*Pro Socio*. IV., 37), consisting of seven Constitutions of minor importance; another title of the Digest (*De communi dividundo*. D. X., 3), much of which, however, relates to common ownership as distinct from partnership; together with some few scattered fragments and Constitutions which have to be collected from other parts of the Digest, Institutes, and Code.* It is, in fact, worthy of note that the rules regulating the relations of partners and third parties are to be found almost entirely in this fragmentary form. Even such literature as does exist has the usual defects of Justinian's compilations. There is the same want of logical arrangement, the same obscurity and apparent antinomy, the obscurity being mainly due to the insertion in the Digest of extracts from the writings of the earlier Jurists without reference to their context.† In the particular case

* Such as D. II., 14, 7; and D. XIV., 1, 1, 25. † D. XVII., 2, 82.

of *Societas*, much difficulty also arises from the fact that the extracts do not always indicate clearly the particular form of *Societas* to which they relate.* And yet, with all this, it will be seen that the Romans have handed down to us much that lies at the very root of the Law of Partnership in modern systems. The merit is really that of the earlier Jurists; the defects are those of Justinian's compilers, "who so handled the work of their predecessors as to shew themselves in many places incapable of understanding it."†

Partnership is a form of association. It would scarcely be within the limits of this Essay to enter on an analysis of the juridical character of the various forms of association which have been recognised by different systems, nor yet to enter on any historical enquiry as to the development of the Law of Partnership. It is worth remembering, however, that an historical origin is claimed for this institution in Roman Law. It is suggested by Sir Henry Maine‡ that the decay of the old community of goods amongst the brotherhood of kinsmen left behind it that form of Partnership which was known as *Societas universorum bonorum*, and that this in its turn gave rise to the other forms of *Societas* recognised by Roman Law.

There appears to be no definition of Partnership in Roman Law. It is clear, however, that this relation was regarded essentially as the result of Contract and not of *Status*. It was this which distinguished it at once from Family Association and from Marriage. Its main requisite was that two or more parties should bring something into a common interest, with the idea of common gain or profit. Pothier regards the partnership relation as analogous to *mandatum*; he inclines, in fact, to treat it as a kind of bilateral mandate,

* D. XVII., 2, 4; D. XVII., 2, 27.

† Pollock, *Digest of the Law of Partnership*, Intr., p. 18.

‡ *Early Institutions*, p. 234.

each partner being at once *mandator* and *mandatarius* in regard to the other or others. Demangeat,* on the other hand, sees some analogy to Marriage; and this is right in so far as it was continuing, consensual, and terminable by *renunciatio*, but the analogy fails in its most essential feature, inasmuch as partnership was not only a contract in its inception, but also in its continuance. Marriage may be a contract in its inception, but in its continuance it can scarcely be regarded in any other light than as a form of *Status*.

It is difficult to attain a complete idea of the conception of Partnership in Roman Law without some reference to the various kinds of Partnership which were recognised. *Societates contrahuntur sive universorum bonorum, sive negotiationis alicujus, sive vectigalis, sive etiam rei unius* (D. XVII., 2, 5 pr.). Even this does not exhaust the enumeration, inasmuch as in a passage almost immediately following (D. XVII., 2, 7) we are introduced to a form of *Societas* called *universorum quae ex quaestu veniunt*†, which was presumed to be the relation intended where no other form was specially agreed upon. Thus there were in Roman Law five forms of partnership:—(1) *Societas omnium bonorum*, which embraced all the property of the partners in whatsoever way acquired, and included contribution even to domestic expenditure: (2) *Societas universorum quae ex quaestu veniunt*, which seems to have been the general form of trade partnership; (3) *Societas negotiationis alicujus*, which was an agreement for the joint conduct of some special business, such as trading in wine or in corn; (4) *Societas vectigalis*, which was an agreement for joint collection of public taxes, and is generally considered to have been merely a particular species of *Societas negotiationis alicujus*; and (5) *Societas rei*, which arose where a particular thing came to be

* Cours Élémentaire de Droit Romain, Vol. II., p. 324.

† The Partnership *par excellence*, says Demangeat, *op. cit.* III., p. 325.

held in common under contract between the parties.* The particular form of partnership chosen, necessarily determined in some measure the rights and duties of the parties, both *inter se* and in regard to third parties, but there were also many common principles which were applicable to all forms of partnership. The result is to present Partnership in Roman Law as a form of association of the most wide reaching and flexible kind, resting, however, on certain fundamental principles.

In English Law, the nature and limits of Partnership are marked out, partly by Case Law and partly by Statute.† Summarising the results of the more important cases, it appears that Partnership in English Law is a contract resting on consent—that it is seemingly narrowed to commercial business ‡—that it usually, but not necessarily, involves a contribution of credit, effort, or property—that it invariably involves a sharing of profits as between the members of the partnership. As the criterion of partnership liability towards third parties, English Law looks either to express agreement, or to agreement to share profits and loss, or to agreement to share profits only § (subject to the limitations imposed by *Cox v. Hickman* and the Partnership Amendment Act, 1865), or finally to the holding out of oneself as partner (though this is strictly only an application of the doctrine of estoppel). Sharing profits will be cogent, and, in some cases, conclusive evidence; but the real ground of liability, the real basis of the partnership relation, lies in “the intention to have a business carried on upon common account.”

* D. XVII., 2, 32 to 34; and D. XVII., 2, 52 to 56.

† The more important cases are *Waugh v. Carver*, *Carver & Giesler* (2 H. Bl. 255), *Cox v. Hickman* (L.R. 8 H.L. 288), and *Pooley v. Driver* (L.R. 5 Ch. D. 458). The Partnership Amendment Act, 1865 (28 & 29 Vict., c. 86), does not appear to do much more than give a statutory sanction to the principles enunciated in *Cox v. Hickman*.

‡ *R. v. Robson*, 16 Q.B.D. 137.

§ *Grace v. Smith*, 2 Wm. Bl. 998.

The Roman conception is in some respects wider, embracing as it does so many various relations ascending from *Societas unius rei* to *Societas universorum bonorum*; whilst in English Law, as suggested by Jessel, M.R., in *Pooley v. Driver*, it is seemingly narrowed to a contract to carry on commercial business. Viewed from another stand-point, the Roman conception is somewhat less comprehensive, inasmuch as it would exclude the position of dormant partner.

It is difficult to ascertain the exact view which was taken by Roman Law of the *Societas* as a body. There is some slender authority for the suggestion that the *Societas* was regarded as having a separate juristic personality. Thus a fragment of Florentinus (D. XLVI., 1, 22) suggests incidentally that a *Societas* stood in this respect on the same footing as an *Hereditas*:—*hereditas personae vice fungitur, sicuti municipium, et decuria et societas*. Demangeat again, on the authority of the passage:—*vectigalium publicorum sociis permissum est corpus habere* (D. III., 4, 1 pr.), considers that a *Societas vectigalis*, at least, was regarded as having a separate personality. The suggestion, however, which is founded on these isolated passages cannot be regarded as tenable. It will be seen hereafter that it is wholly inconsistent with the view taken by Roman Law of the rights and liabilities of individual members of the *Societas*. It was, in fact, this want of a separate juristic personality, and the recognition of individual right and liability on the part of members of the association, which distinguished a *Societas* from a *universitas personarum*.

So in English Law "the firm" is simply a collective description of the individuals composing it. It has no separate legal personality. Under the modern system of procedure, it is true, actions may be brought both by and in the name of the firm, but the only result is to establish a joint and several liability on the part of the partners.*

* Ord. XVI., rr 15, 16.

Again, though accounts are as a matter of mercantile practice kept in the name of the firm, yet this has no practical result on the administration of partnership estates.* In English Law, besides corporations there are companies incorporated under the Joint Stock Companies Acts, 1862 to 1883, which may be with Limited or Unlimited Liability; but Roman Law appears to afford no trace of a Limited Liability Company, unless we agree with Demangeat that the *Societas vectigalis* was regarded as "une personne morale." In English Law, under the Companies Act (25 & 26 Vict., c. 89), a partnership must not exceed ten if it is engaged in banking, or twenty if engaged in other business, unless it is registered as a company or obtains an Act of Parliament. No such limitation of numbers appears to have existed in Roman Law.

Passing, now, to the formation of the contract, no formality seems to have been prescribed for this by Roman Law. The contract was essentially consensual in so far as both in its inception and in its continuance it depended on the consent of the parties; but this consent we are told might be manifested *et re, et verbis, et per nuntium* (D. XVII., 2, 4, pr.) It was originally doubtful whether it could be made on condition, but this seems to have been ultimately settled in the affirmative (D. XVII., 2, 1, pr.). We are told in the same fragment that it might be *in perpetuum*, that is, for the lives of the parties, *vel ad tempus, vel ex tempore*, but it could not be made *in aeternum* (D. XVII., 2, 70). Neither could a partner stipulate for the devolution of his share to his representatives except in the case of *Societas vectigalis*. The contract was essentially

* In the administration of partnership estates, the partnership property is applied as joint estate in payment of the debts due by the firm to third parties, and the separate property of each partner is applied as separate estate in the payment of separate debts. The surplus in either case will be applicable to debts remaining undischarged on joint or separate account.

a *bonæ fidei* contract, both in respect to its formation and the discharge of obligations arising under it. In *Societatis contractibus fides exuberet* (C. IV., 37, 2). It also had to be made for a lawful and honest purpose (D. XVII., 2, 57). It is sometimes stated that the contract had to be made for valuable consideration. This is true in so far as it could not be made *donationis causâ* (D. XVII., 2, 5, 1), and in so far as each partner was at once required to contribute something and to have some chance of profit; but though here, as in *Emptio Venditio* and *Locatio Conductio*, some *quid pro quo* was incidentally required, yet this cannot be said to amount to any formal or even conscious acknowledgment of the doctrine of Consideration as recognised by English Law.

In English Law the ordinary rules of Contract, both as to capacity and consideration and form, apply to the contract of partnership. Under the more developed mercantile system that prevails in our own day, it is usual to embody the more important items of agreement either in articles or a deed of partnership. This instrument usually prescribes the nature of the business, its commencement, style, duration, capital, the interests of the respective partners, and contains provisions as to accounts, books, dissolution, expulsion, and death. Still, it is not intended to define all the rights of the parties, many of which are left to the determination of the general law. Where a partnership has continued after the term specified in the written instrument, it will be regarded as a partnership at will on the old footing. The same is the case where a business is continued after dissolution without further articles.*

With regard to shares, in Roman Law, these might be agreed upon at the time the contract was made. The shares might be equal or unequal, one partner taking a

* *Nicholson v. The Mossend Iron Co.*, L.R. 11 App. Cases 298.

greater share of the proceeds than another; but this was fettered by the condition: *Si modo aliquid plus contulit societati vel pecuniae vel operae vel cujuscunque alterius rei causa* (D. XVII., 2, 29, pr.). It was also decided by Justinian (Institutes, III., 25, 2), after some dispute between the Jurists, that the partners might take different shares of profit and of loss; but the shares in this case had to be estimated on the net result of the partnership operations, and not on each separate partnership transaction: *Sed potest coiri societas ita ut ejus lucri quod reliquum in societate sit omni damno deducto, pars alia feratur, et ejus damni quod similiter relinquatur pars alia capiatur* (D. XVII., 2, 30). It might even be arranged that one partner should be exempt from loss altogether; but Sabinus added the condition: *Quod ita demum valebit, si tanti sit opera quantum damnum est* (D. XVII., 2, 29, 1). An arrangement, however, that one partner should be entirely excluded from participation in profit was wholly void, such an arrangement being called a *leonina societas*, after the old fable. Assuming that the shares were not agreed upon at the outset, then they were presumed to be equal (D. XVII., 2, 29, pr.). Some doubt exists as to the exact meaning of "*Æquas eas esse constat.*" Some commentators regard this as signifying that each partner shared in proportion to his contribution. This is styled "Geometric equality." This view is based on the rule previously referred to—that a specific agreement for unequal shares was only valid if there was a difference in the contributions. It is, therefore, assumed that a partnership entered into without such specific arrangement involved a distribution of the profits in proportion to the contribution. But as contribution might be either in money, or skill and labour, and as the value of the latter would be difficult to calculate, it seems, perhaps, more reasonable to adopt what is called the principle of "Arithmetic equality," and to conclude that, in the

absence of agreement, profits were presumed to be distributable equally as between the partners (*per partes viriles*). It would, perhaps, be giving sufficient weight to D. XVII., 2, 29 pr., if we assumed that this presumption availed unless upset by clear proof of inequality of contribution.

English Law on this subject is in many respects analogous to Roman Law. It does not admit of a *leonina societas*; it estimates profits by the aggregate results of partnership operations; in the absence of agreement, shares are presumed to be equal; although it would seem from the later decisions that the Arithmetic, and not the Geometric principle of equality, is followed, in default of any express or implied agreement to the contrary.* It has already been pointed out that English Law differs from Roman Law in so far as that a partner may share profits as such, without any contribution of capital or skill.

It was permissible in Roman Law to leave the determination of shares to the arbitration of a third party, but it is pointed out in D. XVII., 2, 76—80, that the arbiter's decision could be questioned if it was manifestly unreasonable; the *arbitrium* in the case of *Societas* being *arbitrium boni viri*, the validity of which depended on its being fair and reasonable, and not *arbitrium merum*, which could only be questioned on the ground of fraud. Submission to an arbiter would also be the proper course when no method of determining shares had been agreed upon, and any dispute arose in relation thereto.

In English Law the construction of the partnership contract would be strictly for the Court, but an arbitration clause is almost invariably inserted in articles of partnership.

Turning to the relations of partners *inter se* it may perhaps be well to deal in the first place with rules determining the scope and peculiar relations of the various forms

* *Robinson v. Anderson*, 20 Beav. 98. Lord Ellenborough *contra*, in *Peacock v. Peacock*, 8 Ves. 56. Lord Eldon *reversed*.

of Partnership. In *Societas universorum bonorum*, all moveable and immoveable property of the partners, became common property as soon as the contract was complete. No actual delivery was necessary, although the Roman lawyers endeavoured to uphold the principle "that property in *res corporales* could not pass by contract" by assuming a tacit *traditio* (D. XVII., 2, 1, 1, and XVII., 2, 2). Debts already due to an individual partner could only be sued for in that partner's name, but a cession of actions could be compelled by any of the co-partners (D. XVII., 2, 3, pr.). A fragment from Paulus (D. XVII., 2, 74) indicates that in the case of a subsequent purchase by any partner, the property so purchased did not become at once common property, although common enjoyment could be compelled by the *actio pro socio*. It has already been stated that this form of partnership included all acquisitions whether arising from legacy or inheritance. Its wide scope is indicated by D. XVII., 2, 52, 16; whilst another fragment (D. XVII., 2, 65, 16) shows that it extended even to the *dos* received by one of the partners with his wife, although this was subject to an obligation on the part of the *societas* to refund the *dos* on the termination of the marriage. On the other hand, acquisitions *ex prohibitis causis* did not go into the common fund (D. XVII., 2, 17), although it appears that if such acquisitions were communicated they would remain common property. Whilst bound on the one hand to bring all lawful acquisitions into the common stock, a partner was on the other hand entitled to have all lawful expenses paid out of the common stock; this extended even to the payment of damages in which he might be condemned *injuriâ judicis*, but not *ob malefictum suum* (D. XVII., 2, 52, 18). Neither could money lost in gambling, or after conviction for adultery, be charged against the common property (D. XVII., 2, 59, 1); nor could debts for which

the partner himself could not have been sued (D. XVII., 2, 81). In *Societas universorum quae ex quaestu veniunt* only such acquisitions as were in the nature of business profits entered into the partnership account; *quaestus enim intelligitur qui ex opera cuius descendit* (D. XVII., 2, 8). It was sometimes professedly made *et questus et lucri*, but this did not affect the nature of the contract (D. XVII., 2, 13). Hence a member of a trade partnership would not be bound to contribute acquisitions in the shape of legacies, gifts, and inheritances (D. XVII., 2, 71, 1). Nor was there any claim to indemnity in respect of debts unconnected with trade; *sed nec aes alienum nisi quod ex quaestu pendebit veniet in rationem societatis* (D. XXII., 2, 12). In *Societas negotiationis alicujus*, only what was gained or lost in respect to the particular transaction or peculiar kind of business came into the partnership account (D. XVII., 2, 52, 5).

There were, however, certain common principles applicable to all forms of partnership. In the first place, every partner had a right to the use and enjoyment of common property (D. XVII., 2, 52, 13). This right of user and common enjoyment was limited, as previously indicated, to property which, either by special agreement, or by the form of partnership chosen, was intended to be brought into the common stock. Equally important was the right of each partner to his agreed share of the partnership gains during the continuance of the association, and to his share of the partnership assets on its dissolution. The scope of this would again be determined by agreement, or by the type of partnership chosen. The limits of common gain are indicated in two passages of the Digest already referred to (D. XVII., 2, 52, §§ 5 and 6). Moreover, if in an association consisting of three partners, one partner sued another and recovered his full share of the partnership assets, but the third recovered less than his

full share, the last was entitled to insist on an equal division as between himself and the first : *Quasi iniquum sit ex eadem societate alium plus, alium minus consequi* (D. XVIII., 2, 63, 5). Each partner also had a right to recover all expenditure, and to be indemnified in respect of all liabilities, properly incurred on behalf of the partnership (D. XVII., 2, 52, 12). Thus, a partner travelling on behalf of his firm to buy merchandise could recover his travelling expenses, including the cost of conveying himself, his baggage, and the goods (D. XVII., 2, 52, 15). A case is mentioned (D. XVII., 2, 52, 4) in which a partner, travelling on behalf of his firm, was plundered by robbers both of his own private property and of the money he took with him to purchase merchandise. It was held by Julianus that the loss of the partnership money was a common loss, and that the other members of the firm would be liable to contribute both in respect to private losses and expenses (D. XVII., 2, 52, 4). A curious case is also mentioned which shows that the scope of this right to indemnity was not always interpreted so liberally, Labeo, at least, having drawn a subtle distinction between expenditure *in societatem* and *propter societatem*, but this subtlety was rejected by Julianus, whose opinion was confirmed by Justinian (D. XVII., 2, 60, 1, and XVII., 2, 61). Not only was a partner entitled to recover moneys expended, but he was also entitled to recover interest thereon (D. XVII., 2, 67, 2). Each partner also appears to have had a right of alienation, but this only extended to his own share : *nemo ex sociis plus parte sua potest alienare, etsi totorum bonorum socii sint* (D. XVII., 2, 68, pr.) ; but this did not extend to the right of devolving his share either upon a transferee or even of transmitting it to his representatives in the event of his death, without the formation of a new association. Lastly, every partner was entitled to require on the part of his associates the exercise of the most complete good faith, and of reasonable care and diligence.

The diligence required, however, was only *diligentia mera* and not *diligentia exacta*; the interests of the parties being identical, and it being to a great extent the fault of the partnership itself if any partner was admitted who was deficient in ability or care. *Socius socio etiam culpa nomine tenetur, id est desidia et negligetiae. Culpa autem non ad exactissimam diligentiam dirigenda est: sufficit etenim talem diligentiam communibus rebus adhibere, qualem suis rebus adhibere solet, quia qui parum diligentem sibi socium acquirit, de se queri debet* (D. XVII., 2, 72). It was, however, accounted a ground of liability if a partner failed to contribute the service or skill stipulated for (D. XVII., 2, 52, 1). Much more was a partner liable for misfeasance or fraud. Nor was there any right to set off against loss by negligence, profits made by extra diligence (D. XVII., 2, 26). Though liable for negligence or misconduct within the limits stated, a partner was not liable for *damna quae imprudentibus accidunt, hoc est damna fatalia* (D. XVII., 2, 52, 3). Thus if a partner had been entrusted with the custody of cattle belonging to the partnership he was liable if the cattle were stolen, this being regarded as the result of his negligence, but not if they were carried off by brigands or killed by fire (D. XVII., 2, 52, 3). Unlike the English Common Law, Roman Law allowed one partner to bring an *actio furti* against another, where the latter had been guilty of embezzling, or fraudulently dealing with, the partnership property (D. XVII., 2, 45). This *actio furti* could be brought together with the *actio pro socio*:—*Sed et pro socio actione obstrictus est, nec altera actio alteram tollet* (D. XVII., 2, 45); but if *condictio furtiva* were brought then it barred the *actio pro socio*, except for any balance of indebtedness (D. XVII., 2, 47). A partner guilty of injuring the partnership property was liable to an action under the *Lex Aquilia*:—*Sed actione pro socio consequitur ut altera actione contentus esse debeat, quia utraque actio ad rei persecutionem respicit, non ut furti ad poenam dumtaxat* (D. XVII., 2, 50).

A partner was also liable to a prosecution under the *Lex Fabia de plagiariis*, in cases within that Statute.

In allowing an action of theft to be brought by one partner against another, the Roman jurists apparently failed to carry the principle of joint ownership between partners to its logical conclusion ;* but this was a sacrifice of principle to convenience which our own law has had to follow.

With regard to transfer, a partner could not in Roman Law introduce another either in his own stead or as an additional member (D. XVII., 2, 19). He might alien his own share of profits or take to himself a partner in regard thereto, but the sub-partner in this case would not be a member of the original *societas* unless admitted with the consent of all (D. XVII., 2, 20). The partner who improperly attempted to admit another, without his co-partners' consent, remained personally liable to the latter for all acts or defaults of the former. It was not enough to merely cede to his co-partners his right of action against the sub-partner (D. XVII., 2, 21). Neither could he set off against the loss arising from the conduct of his sub-partner any extra profits due to the latter's efforts. He was, moreover, responsible to the sub-partner for loss accruing from the operations of the original partners, and could even be sued by the former before any suit had been instituted against the latter (D. XVII., 2, 22).

The English Law on this subject is very similar. The right to common enjoyment of the partnership property,

* It is assumed here that there was a joint ownership of the property as well as the profits of the *societas* (*De Societate*, p. 3). Pothier contends that there was only a community in the profits. It is very doubtful whether the passage *Nemo societatem contrahendo rei suae dominus esse desinit* (D. XIX., 5, 13, 1) warrants this view. It does not seem to go farther than this, that on the inception of the partnership each partner converted his separate property into a joint property, without however ceasing to be owner.

the right to contribution and indemnity, the right to diligence and good faith on the part of co-partners, the right to share in all partnership gains and in the distribution of the partnership assets, are all equally recognised. Amongst the points of contrast that suggest themselves, is the fact that English Law accords to each partner a far more extensive power of binding the partnership property and binding members of the partnership than Roman Law. This, however, is a matter which will be dealt with in connection with the relations of partners to third parties. Another difference is the right of action which was admitted by Roman Law between the partners in respect of theft and other misconduct. At Common Law one partner could not sue another in respect of a partnership matter, nor would, strictly, any prosecution have lain for theft or embezzlement of the partnership funds. These defects have now been remedied, partly by the action of the Court of Chancery and partly by Statute.

It is on the subject of the relations between partners and third parties that we find the most striking contrast between Roman Law and English Law. Dr. Hunter says, "it is almost an essential element of the modern notion of co-partnership that each partner is agent for all the others within the scope of the partnership; but the implied agency of one partner to another did not enter into the Roman notion of co-partnery."* It is worthy of remark that on this subject the 17th book of the Digest (Title II., *Pro Socio*) is singularly deficient in information. Most of the information attainable has to be collected from scattered fragments of other parts of the Digest. There are, however, two fragments of this Title which seem to indicate that a partner who entered into a contract with a third party even in a matter relating to the partnership account,

* Hunter, *Roman Law*, p. 521. It will be seen that this statement goes somewhat in excess of the truth.

was *primâ facie* solely entitled and solely liable on the contract. Thus in D. XVII. 2, 74, we are told, *si quis societatem contraxerit, quod emit ipsius fit, non commune*, from which we may conclude that the individual partner entering into the contract alone could sue on it; whilst in D. XVII., 2, 67, pr., it is stated, *si unus ex sociis rem communem vendiderit consensu sociorum, pretium dividi debet ita ut ei caveatur indemnem eum futurum, quod si jam damnum passus est, hoc ei praestabitur*, which seems to imply that the purchaser in such case looked solely to the contracting partner, he again looking to his co-partners for security or indemnity. But though a partner, contracting separately, even in a matter relating to the business of the partnership, became solely entitled, yet the other partners could, if necessary, compel him to cede his rights of action; whilst if the question was one of liability, he could, under certain circumstances, insist upon security being given (D. XVII., 2, 67, pr.); and in any case he had a right of contribution against his co-partners if he had acted within his right (D. XVII., 2, 67, pr.).

It seems to have been not unusual, however, for all the partners to join in a partnership contract. In this case, if the contract was by stipulation and *in solidum*, they were all entitled and liable *in solidum* (D. XLV., 2, 2). If, on the other hand, no such obligation *in solidum* was set up, then it would seem that they were only liable *pro rata* (D. XIV., 1, 4 pr.).* It appears, however, from D. II., 14, 27, pr., that in the case of *Argentarii*, each partner could sue (and, presumably be sued) *in solidum* in respect to all partnership debts.† It appears, also, by implication from

* *Pro proportionibus exercitionis conveniuntur; neque enim invicem sui magistri videntur*; but *aliter*, if they appointed one *magister*.

† This at least is the view taken by Treitschke in "Die Lehre von der unbeschränkt obligatorischen Gewerbe-gesellschaft," p. 145. He also refers to fr. 9 and fr. 25 in furtherance of this view

D. XLV., 2, 10, that even if two partners were joint promisors *in solidum*, one would have the *exceptio compensationis* against the promisee in respect of a debt due by him to the other partner.

Assuming that the contract was not a joint contract, but was made by one of the partners separately, even then, if such partner could be regarded in any way as *institor* or *exercitor* in respect to the partnership business, each of the other partners would, under the later Roman Law of Agency, become liable to an *actio institoria* or *exercitoria* (D. XIV., 1, 1, 25); but this would clearly only avail when the contract was within the scope of the ordinary business of a trade partnership.* Where this was not the case, still, if the partner entering into such separate contract had acted as the agent of the other partners, he would, as previously stated, be entitled to contribution and indemnity, and could exact this by the *actio pro socio*, or by the *actio mandati*; whilst under the later Roman Law of Agency, the other partners would (according to one theory, without cession of actions, according to another theory, on a cession of actions) be entitled to sue the other party to the contract. There was another method by which the members of a partnership could be rendered responsible to a third party who had contracted with one of their number, and this was by the adoption of the benefit arising from the contract. This seems to be indicated by D. XVII., 2, 82: *Jure societatis per socium aere alieno socius non obligatur, nisi in communem arcam pecuniae versae sunt*. Some question has been raised as to the exact effect of this fragment, but it seems to be in complete accord with the principles suggested. Thus, stated briefly, the law appears to have been:—that *socii* were *primi facie* liable to third parties only on transactions to which they themselves were parties—that if the transaction was a joint

* There was also an *actio quasi institoria*. Mr. Moyle thinks that the combined scope of these actions took in nearly all trade contracts.

transaction then they were jointly liable thereon either *in solidum* or *pro rata*—that if it was a separate transaction, entered into by an individual partner, then the other *socii* could only be rendered liable to the creditor or creditors, (1) if the matter fell within the scope of either the *actio exercitoria institoria* or the *actio quasi institoria*, or (2) the other *socii* had adopted the benefit of the transaction (*in communem arcam pecuniae versae sunt*).

The English Law on this subject may be stated briefly as follows:—“ Each partner is in contemplation of law the general and accredited agent of the partnership, or as it is sometimes expressed, each partner is *praepositus negotiis societatis* and may consequently bind all the other partners by his acts in all matters which are within the objects and scope of the partnership.”* But one partner cannot bind the other or others, if his authority is restricted by the partnership agreement, and this is known to the other contracting party. As the result of this principle, partners in trade have an implied authority (amongst other things) to accept, make, and issue negotiable instruments on behalf of the firm, to borrow money on its credit, to pledge goods, deposit deeds, buy and sell merchandise, and accept and give receipts for debts. There are other transactions in respect to which no authority is implied, such as the execution of deeds, the giving of guarantees, and submission to arbitration. Assuming, however, that the transaction is within the scope of the partnership business, then each and every of the partners will be jointly, and in the case of mercantile transactions, severally, liable for all obligations arising thereon.

With regard to the liability of a *Societas* for torts committed by its members, the extent of this, so far as recog-

* *Story on Agency*, p. 24, quoted in Pollock, *Digest of the Law of Partnership*, p. 26.

nised by Roman Law, has been indicated in connection with the *Societas universorum bonorum*.*

In English Law it is perhaps sufficient to say that a firm is liable for loss or injury caused to third parties, or penalties incurred by the negligence, fraud, or other wrongful act of any partner acting in the ordinary course of the business of the firm; or for misapplication of money or property received for or in custody of the firm.†

The dissolution of *Societas* in Roman Law was effected *renunciacione, morte, capitis minutione et egestate*‡ (D. XVII., 2, 4, 1). The causes of dissolution are tersely summed up by Ulpian, who says, *Societas solvitur ex personis, ex rebus, ex voluntate, ex actione* (D. XVII., 2, 63, 10). The *Societas* was dissolved *ex voluntate*, when it was mutually agreed between all partners to put an end to the association, or when one partner wished to withdraw, this being more properly called *renunciatio*. With regard to dissolution by common consent this might be either expressed (D. XVII., 2, 65, 3) or implied, as in the case where each of the partners began to act separately on his own behalf, even though there was no formal dissolution (D. XVII., 2, 64). The *Societas* was said to be dissolved *ex personis* when one of the parties died or underwent a *capitis minutio*, unless this was only *minima*. It included also the case of *publicatio*, or confiscation of the property of one of the partners (Inst., III., 25, 7. D. XVII., 2, 65, 12);§ the reason assigned being that his place was taken by another and that he himself was held *pro mortuo*. The partnership was dissolved *ex rebus* when the object for which it was formed was fulfilled, or some condition upon which it was made ceased, or when the partnership property ceased to exist (D. XVII., 2, 63, 10). It was dissolved *ex actione* by

* D. XIV., 1, 1, 9.

† Pollock, *Partnership*, pp. 37, 38.

‡ This probably implies either bankruptcy or total loss of means.

§ Cf. English Law, 33 & 34 Vict., c. 23

one of the partners bringing an action *pro socio* with a view to dissolution (D. XVII., 2, 65, pr.), although it appears that the bringing of the action *pro socio* did not always involve dissolution (D. XVII., 2, 65, 15). This cause of dissolution also seems to have included a novation of the partnership contract by stipulation (D. XVII., 2, 65, pr.). The sale of the goods of any one partner by his creditors had the same effect (D. XVII., 2, 65, 1). Efflux of the time agreed upon does not appear to have worked a dissolution *per se*, but it gave to all parties a right to dissolve (D. XVII., 2, 65, 6). There was no dissolution of *Societas* by *arrogatio* or *capitis minutio minima*, the arrogate remaining partner (D. XVII., 2, 65, 11). Of all these, two only—*renunciatio* and death—call for further remark.

With regard to *Renunciatio*, it was a fundamental principle of Roman Law that the *Societas* continued only so long as the consent of parties continued. *Tam diu societas durat, quam diu consensus partium integer perseverat* (C. IV., 37, 5). For this reason an agreement not to renounce partnership was void, although an agreement not to divide common property within a specified time was good, and precluded alienation* (D. XVII., 2, 14). But a partnership might be made for a fixed period, and if this were the case a *renunciatio* by one partner before the time had elapsed, had the effect of releasing the others without releasing the partner himself, the result of which was that he had to bear his share of subsequent losses, but was not entitled to share subsequent profits, unless *ex necessitate quadam facta sit*.†

* The plea in such a case was available even against a purchaser or alienee, the latter being regarded as having no better title than his assignor. A partner who divided contrary to such an agreement was liable both to an *actio pro socio* and a *judicium communi dividundo* (D. XVII., 2, 17, pr.).

† The purport of this exception is explained by D. XVII., 2, 14, 15. A partner called away on public service was also at liberty to renounce, unless his duties could be discharged through an agent (D. XVII., 2, 16, pr.).

Even where there was no time fixed for the duration of the partnership, a partner was not at liberty to renounce *intempestive* (D. XVII., 2, 65, 5). Thus a partner in a *Societas universorum bonorum* was not at liberty to renounce in order to secure the sole benefit of an inheritance coming to him (D. XVII., 2, 65, 3).

The death, either natural or civil, of one of the partners also had the effect of dissolving the association. In *Societas vectigalium*, however, the death of one of the partners did not necessarily dissolve the association, and his share might by special agreement pass to his heir. Neither did the rule apply to the case of the *Societas unius rei*, if the death of a partner was unknown.* Where an ordinary partnership was dissolved by death, although the heir of the deceased partner could not even under any prior agreement succeed to his place (D. XVII., 2, 35, 1), yet the remaining partners might if they liked enter into a new contract with the heir, and thus perpetuate the association on the old lines (D. XVII., 2, 37). In default of this a community of goods arose between the heir and the surviving partners, but no partnership (D. XVII., 2, 63, 9).† The heir was entitled to claim a distribution and division of the effects of the partnership with a view of securing his ancestor's share; this he could enforce by a *judicium communi dividundo*. The heir had, however, a continuing authority, and was bound to exercise it for the purpose of winding up transactions which had already been begun (D. XVII., 2, 40). In respect of such transactions he was liable both for *dolus* and *culpa* (D. XVII., 2, 36, and D. XVII., 2, 59).

The effect of dissolution generally seems to have been to give every partner a right to an equal distribution of the

* See *infra*.

† The Roman lawyers did not regard the legacy in the case mentioned in the fragment as a partnership profit.

partnership assets. All debts and liabilities incurred before dissolution had to be satisfied out of the common fund (D. XVII., 2, 27). In the case of conditional or outstanding obligations, security had to be given for proper apportionment and contribution (D. XVII., 2, 27 and 28). Strictly, all new contracts and transactions availed and bound only the individual entering into them. There were, however, some exceptions to this. Both a partner and the heir of a deceased partner seem to have had a continuing authority for the purpose of winding up (D. XVII., 2, 40). Where a partnership had been effected for the purchase of a particular property, and the property was purchased, but a profit or loss ensued after the death of one of the partners, this had to be shared in common (D. XVII., 2, 65, 2). Where partnership was constituted for a certain purpose, and one partner died *integrīs omnibus manentibus*, after which the object was attained, then any profit or loss accruing was regarded as the subject of common account, if the death of the partner was unknown, but was the subject of separate account if the death was known (D. XVII., 2, 65, 10). Still, the general rule was that all expenditure properly incurred after dissolution had to be borne equally, though for this purpose the *judicium communi dividundo* and not the *actio pro socio* had to be resorted to (D. XVII., 2, 65, 13).

In English Law the causes of dissolution are very similar. If there is no agreement to the contrary, express or implied, dissolution may take place at any time by notice; after which the partnership will continue only for the purpose of winding up. The Court of Chancery would, however, intervene to prevent a dissolution and sale of the partnership property which was either fraudulent or likely to cause irreparable mischief. A partnership effected for a fixed period would strictly terminate at the expiration of such period. If the association were continued subsequently, it

would have the effect of creating a partnership on the old terms, but determinable at will. Partnership in English Law is also determined by Bankruptcy, outlawry, death, or by the business becoming unlawful.* As in Roman Law, the dissolution is as between all, unless there is an agreement to the contrary. It is also dissolved by one partner assigning or even encumbering his interest in the property or profits of the firm, unless the partnership is for a fixed term, in which case it will not operate as a dissolution *per se*, but will afford a good ground for a decree of dissolution by the Court. Other grounds on which a decree for dissolution may be asked for† are the lunacy or permanent incapacity of any individual partner, a criminal prosecution undertaken against him, conduct rendering the successful transaction of business impossible, or the impossibility of carrying on business except at a loss.

The principal contrast between Roman Law and English Law, in regard to dissolution, seems to be that many of the events which, in Roman Law, worked a dissolution *per se*, in English law only afford a ground for a decree of dissolution by the Court. According to English Law, in the case of dissolution or retirement, there must also be express notice to those who have previously dealt with the firm, besides general notice, in order to determine liability. As in Roman Law, partners have a continuing authority for the purpose of winding up (except that a firm is not bound by the act of a bankrupt partner). The effect of dissolution is to give each partner, or the representatives of a deceased partner, a right to have the partnership property applied (1) to the payment of the debts of the firm, (2) to the payment of sums due to individual partners, (3) to a return

* *Esposito v. Bowden*, 7 E. & B. 763.

† Generally only by some partner other than the one whose conduct or capacity is complained of; but in the case of lunacy a dissolution may be sought for on behalf of the lunatic himself.

of the capital introduced by the respective partners; after which the residue will be distributable in the same proportion as profits. Another point of contrast seems to be that, whilst in Roman Law, a distribution of the corporeal property could be secured by a *judicium communi dividundo*, in English Law the right of each partner is only a right to money after the affairs of the partnership have been wound up and the partnership property sold.* It is also worthy of remark that in English Law any partner may require the goodwill to be sold for the common benefit, but Roman Law does not seem to have recognised the goodwill as an asset.

The only subject that now remains to be dealt with is that of the Remedies. Whilst on this subject, we cannot fail to remark how much of our information on the substantive law of partnership is derived from opinions and decisions on the scope and application of the different forms of action. In fact, the Roman Law of Partnership seems to have been largely built up on rules laid down at various times and by various Jurists, as to the application of the *actio pro socio*. Here, as in other departments of Roman Law, substantive law seems to have been to a great extent enunciated in connection with procedure. The very Title *Pro socio* affords some proof of this.

The remedies available to third parties against members of a partnership have already been referred to. With regard to remedies available as between partners themselves, we find in Roman Law two main processes—the *actio pro socio* and the *judicium communi dividundo*. These, though to some extent coincident (D. XVII., 2, 38, 1), yet differed both in their nature and in their scope. The *actio pro socio* was essentially founded on contract and lay for the enforcement of personal obligations; the *judicium communi dividundo* was essentially founded on community of

* Lindley, 681.

property, and had the advantage of enabling a division of the corporeal property with all necessary apportionment and allowance to be made (D. XVII., 2, pr. 31 & pr. 43). Where they were coincident it was an essential rule that if the *judicium communi dividundo* were brought, the *actio pro socio* would lie only for the balance of the indebtedness (D. XVII., 2, 43).

The *actio pro socio* seems to have had for its main object a dissolution of partnership and a settlement of the partnership accounts; but it might also be brought to enforce the obligations of a continuing partnership (D. XVII., 2, 65, 15). If it was brought with a view to dissolution, then it had the effect of dissolving all partnerships where there were several between the same parties (D. XVII., 2, 52, 14). The action was essentially a *bonae fidei* action (D. XVII., 2, 52, 1); and it also involved *infamia* on the part of any one condemned under it (Inst. IV., 16, 2). It might be brought by one individual partner against another, by the *Societas* against one of its members, or by one of its members against the *Societas*. It lay even against a *paterfamilias* by whose order a *filiusfamilias* had entered into partnership (D. XVII., 2, 24). It might also be brought against the heir of a deceased partner to enforce the obligations of *bona fides* and reasonable diligence, even though the heir was not a partner, the reason assigned being that the heir was *emolumentum successor* (D. XVII., 2, 63, 8). To take some specific illustrations of its application, it lay against a partner who failed to contribute stipulated services (D. XVII., 2, 69), or who failed to communicate common profits, or to contribute to common expenses (D. XVII., 2, 38, 1); or who was guilty of fraud or failed to act up to the required standard of care (D. XVII., 2, 35 & 36). It could be also brought, by an individual partner who had spent money on repairing common property, against the firm (D. XVII., 2, 52, 10). Finally, it might be brought by

one partner against another, to recover an outlay which was properly chargeable to the latter as manager (D. XVII., 2, 65, 14); or to recover from one partner what he had received beyond his proper share (D. XVII., 2, 63, 5); or to recover a contribution for loss or liability, which had proved larger than anticipated owing to the insolvency of some partner (D. XVII., 2, 67 pr.). It was the duty of the arbiter in an action *pro socio* to take account of outstanding credits or debts, and of possible losses or profits, and to exact the necessary guarantees for securing equality of distribution (D. VII., 2, 38). An action *pro socio* also included the recovery of interest in cases where a profit which ought to have been communicated had been culpably retained by one of the partners and used by him (D. XVII., 2, 60, pr.); but it was not *quasi usuras sed quod socii intersit moram eum non adhibuisse*. It also enabled a partner to recover interest on sums due to him which he had advanced on partnership account (D. XVII., 2, 67, 2).*

In actions between partners, the defendant enjoyed a special privilege—*beneficium competentiae*—that is, he was entitled to limit the *condemnatio* to such sum as would leave him adequate means of subsistence. This privilege was available whether the *Societas* was *universorum bonorum* or *unius rei* (D. XVII., 2, 63, pr.), the reason assigned being that *Societas jus quoddammodo fraternitatis in se habeat*. But this did not apply where one partner denied the existence of the partnership (D. XVII., 2, 67, 3); nor to cases where a partner had fraudulently deprived himself of the means of paying (D. XVII., 2, 63, 7); though, if his failure was only due to *culpa*, then the privilege still availed him. The privilege, however, was confined to the partners themselves and their *defensores* (agents in action), and did not avail a surety or the representatives of a deceased

* So in English Law when a right to contribution has been established, interest is allowed on the amount advanced at the rate of 5 per cent.

partner (D. XVII., 2, 63, 1 & 2). It may be added that, though a partner did not need to give security for the purpose, yet he was bound to make up any deficiency if he subsequently acquired the means (D. XVII., 2, 63, 4).

The *judicium communi dividundo* belonged to the class of actions called *mixtae actiones*, because each party was, in fact, although not technically, both plaintiff and defendant. In its connection with *Societas*, this process was generally resorted to for the purpose of securing distribution of corporeal property after dissolution, especially as between the heir of a deceased partner and the survivors. It might, however, be resorted to by a *socius* for the purpose of recovering either money spent on, or profits arising from, common property (D. XVII., 2, 38, 1); whilst in the case of expenditure on common property after dissolution, it was the only remedy available (D. XVII., 2, 65, 13). It included not only a power of distribution, but also powers of valuation and apportionment (Inst. IV., 17, 5).

Of the other actions available in connection with *Societas* little remains to be said. If, on the formation of the contract, a penalty had been stipulated for, then the *actio ex stipulatu* had to be brought, *pro socio* lying only for any balance of compensation that might be due after allowing for the penalty (D. XVII., 2, 41 & 42). In addition to this, if the parties had embodied the terms of their contract in a stipulation *novationis causâ*, then only the *actio ex stipulatu* could be brought (D. XVII., 2, 71 pr.). The nature and application of the other remedies which were incidentally available, such as the *actio furti*, the *condictio furtiva* and the *actio legis Aquiliae* have already been referred to.

At Common Law one partner could not sue another in respect to a partnership matter, and could not therefore obtain an account unless there was a special covenant for breach. Nor could two firms having a common partner

sue one another. The remedies available at law, whether as between partners during the continuance of the association, or to creditors on the death of one of the partners, were both meagre and inadequate. These defects have, however, been remedied by the interference of the Court of Chancery, which, as No. I. Division of the High Court, has now exclusive jurisdiction in matters relating to dissolution of partnership and account (Jud. Act, 1873, § 34). In fact, it would seem that in practice this Division exercises an exclusive jurisdiction in all cases of complexity or difficulty. Amongst the remedies available are specific performance, injunction, decree for dissolution, including the taking of accounts and the appointment of a receiver. Besides these, the Court will decree the taking of accounts without reference to dissolution, and will also grant discovery, in aid of an action at law or even of a compulsory reference to arbitration. It will perhaps be sufficient, without attempting to describe in detail the application of these remedies, to point out that they enable the Court to administer a remedial justice that adapts itself to every possible breach of partnership duty, and to accord that relief which may be best calculated to meet the exigencies of each case.

It is with respect to the remedies afforded, therefore, that English Law appears at first sight to contrast most favourably with the earlier system. Looking at the matter more closely, however, it will be seen that there are but few of the objects attainable under the jurisdiction of the Chancery Division of the High Court, which were not attainable in Roman Law by means of the *actio pro socio* and the *judicium communi dividundo*. Under the *actio pro socio* it was possible to secure the taking of accounts, to make provision for outstanding debts or for anticipated gains or losses, and to obtain all necessary guarantees. Under the *judicium communi dividundo*,

the arbiter had extensive powers of valuation and apportionment; he could take an account of expenses and liabilities properly incurred even after dissolution, or of damage done to the partnership property; he had wide discretion in dealing with the property in the common interest; he could decree contribution and common user.

In fact, in neither of its two chief points of contrast with English Law, does Roman Law really lag so far behind our own in the matter of practical convenience. In the department of procedure, English Law excels rather in the specialisation of its remedies than in their general efficacy. Again, with regard to the relations between partners and third parties, the Agency which English Law implies within the scope of the partnership business is, no doubt, highly conducive to mercantile convenience; but after the introduction of the *actio institoria* and its extension as a *utilis actio*,* it must have been almost as easy to fix the *societas* with liability for the acts of its members who were engaged in conducting the affairs of a trade partnership, as it is in English Law. Nor must it be forgotten that the Common Law alone fell far behind Roman Law in respect to the remedies it afforded as between partners themselves; and that the remedial jurisdiction of the Court of Chancery was largely influenced by principles derived from Roman Law.

It is, perhaps, rather in the new forms of commercial association which English Law recognises, such as Joint Stock Companies, and of which no trace seems to exist in Roman Law, that the superiority of our own system is most manifest. These are called by Mr. Pollock† extraordinary partnership regulated by special legislation, and seem scarcely to fall within the domain of pure partnership.

* *Institoria utilis*, or *quasi institoria*. Moyle, *Institutes of Justinian*, 486.

† *Partnership*, p. 2.

Regarding the Roman Law of Partnership as a whole, it cannot be contended that it has afforded as valuable a contribution to modern law and thought as some other departments of Roman Law, such as Ownership and Possession. This may perhaps be accounted for by the greater variance between the respective commercial conditions of the two systems. Still, our examination of the Law of Partnership, cursory as it has been, has revealed a substantial body of rules, capable of general application, and characterised at once by sound philosophy and practical wisdom. Many of these have, in fact, descended to or been adopted by modern systems of Partnership. If we take into consideration the gulf of time that lies between the two systems, and recall that the Roman lawyers evolved this body of rules by their own unaided efforts, we shall find it difficult to withhold our tribute of admiration at their success.

PITT COBBETT.

II.—CORONERS AND FIRE INQUESTS.

ONE of the most important subjects, and one which interests in a particular manner every member of the community, is the origin of the fires which occur every year with frequency in our large towns, more especially in London, and occasionally in the country. Matters connected with politics, or with commerce, so readily absorb public time, public thought, and public opinion, that an unpretending, common-place subject, such as the present, is quite neglected; or, at the best, after a few abortive attempts at dealing with it, is quietly shelved. In 1885, some correspondence on the subject took place between the Home Office and the Metropolitan Board of Works;

but there the matter ended. To this may be added some endeavours which have been from time to time made by Members of Parliament to introduce some Bill, or Bills, having a more or less comprehensive scope, to mitigate the evil. Such Bills, however, have hitherto only gone to grace the annual Massacre of the Innocents.

The result is this, that at the present moment, if no death has resulted from a fire, and although the origin of the fire may be doubtful, suspicious, or evidently the work of an incendiary, there is no legal machinery by which the surrounding circumstances, or facts, can be investigated. Such surrounding events might, if inquired into, often tend to elucidate the cause of a fire. But there is no official investigation. Property may be destroyed, lives jeopardised, millions upon millions lost, yet the origin of the fire causing these disasters may, and often does, remain a mystery. If property be insured, the Assurance Company may possibly make some private inquiries before paying over the sum assured. But the Company is not bound to do so. It is a private matter; and if the amount assured be small, the company may find it cheaper to pay the money than to undertake an investigation—an investigation which must be made at hap-hazard,—without any power of collecting witnesses, or of obliging unwilling witnesses to speak, or of administering an oath; an investigation which, if made at all, must necessarily be made under considerable difficulties.

Hence it may be said that even large fires, if unaccompanied by loss of life, are not officially, and seldom privately, investigated.

Mr. Payne, the Coroner for London and Southwark, writing to the Home Office in 1882, revived the question whether an official inquiry should not be made into the cause and origin of all fires. He says: "To make the inquiry certain all over the kingdom would require the

appointment of a very large staff of officers ; but there being Coroners in every county, the machinery is already formed and only requires to be set in motion. An inquiry by a jury of the neighbourhood would ensure a knowledge of the locality, and in most cases an acquaintance with the premises burnt." He encloses a Draft Bill, prepared by him, to enable Coroners to make such inquiries. This letter and Draft Bill were forwarded by the Home Office to the Metropolitan Board of Works, with an inquiry whether the latter would be prepared to defray the necessary expenditure, if the scheme were carried out. To this the Board replied, that it would defray the expenditure in all cases where it might consider it necessary that such inquiry should be held, and that the inquiry should be held by some officer other than a Coroner. Here the material correspondence appears to have ended, but its publication as a Parliamentary Paper has served the useful purpose of bringing this frequently-discussed question again before the public. The position taken by the Board of Works is, however, untenable, for it would place them—a body of men highly respectable, no doubt, but without any legal or scientific training whatsoever—in the position of arbiters to determine whether a fire investigation was or was not necessary ; and, further, if the turn of the balance, or the odd vote, should prove adverse to the holding of such investigation, the same body of men could immediately, and without any other reason than a *sic volo*, cut off the supplies.

In delicate matters, where crime may oftentimes be suspected by a public official, although he dare not openly suggest it, it is most necessary that his hands should be unfettered. He should be an officer of trust ; and, being intrusted with duty, he should be allowed to discharge it on every occasion that he may think necessary, without being brought to consider whether a Metropolitan Board of

Works, or any other kindred body, will or will not on each occasion approve of his doings and reimburse him his expenses.

The objection of the Board of Works to the services of the Coroner in carrying out a fire investigation is difficult to perceive, unless it be that the old rule which formerly held sway in the election of a Coroner is not enforced, or has fallen into disuse. Formerly, none but lawful and discreet knights could be chosen Coroners; and there is an instance in the fifth year of Edward III. of a man being removed from this office because he was only a merchant. It was deemed necessary that a Coroner should have an estate sufficient to maintain the dignity of his office, and to answer any fines that might be levied on him for misbehaviour. Now, through the culpable negligence of gentlemen of property, this ancient judicial office has been suffered to fall into comparative disrepute, and, for the most part, has got into the hands of those whose desire to be chosen Coroners is not without a view to the fees attached to the office.

But we do not consider this a sufficient reason for giving the go-by to the Coroner; on the contrary, we consider him to be the proper and most ancient authority for carrying out the duty of a fire inquest. Granted that the office has fallen into the hands of those who make profit by exercising it, there is no reason why such persons should not exercise the office with honour and with integrity. Further, the argument of the inferiority in the social scale of the modern Coroner should obtain rather in the case of an inquest on a dead body, than in the case of an inquest on a fire. In the former case it is sometimes doubtful whether the death is so unexplained as to demand an inquest, and the avarice of a Coroner might turn the scale of debate. In the latter case no such question can arise; a Coroner should hold an inquest on every fire,

great or small. There is no question of personal gain; added to which, the Coroner might be paid by a yearly salary.

In 1867 a Select Committee of the House of Commons was appointed to inquire, 1stly, into the existing legislative provisions for the protection of life and property against fires in the United Kingdom; and, 2ndly, as to the best means to be adopted for ascertaining the causes and preventing the frequency of fires. The Committee consisted of seventeen members, Mr. Beach, Mr. Agar-Ellis, Mr. Gorst, Lord Richard Grosvenor, Mr. Horsfall, Mr. Kinnaird, Mr. Lanyon, Mr. Leeman, Mr. Lusk, Mr. McLagan, Mr. Miller, Mr. Read, Mr. Henry B. Sheridan, Mr. Turner, and Mr. Whitmore, to whom were afterwards added Mr. Tite and Mr. Laird. The Committee sent for persons, papers, and records, and held in all twenty-two sittings. They received a great deal of evidence as to investigation into the causes of fires in this and in other countries. It appeared to the Committee that it was the general practice on the Continent,* in Australia, and in America, to inquire into the origin of all fires, and that the result of such investigations was to reduce the number of fires. In those countries, in most instances, the settlement of claims on insurance companies is deferred until the termination of the inquiry.

The Committee published a lengthy report on the evidence which they had taken, and made several valuable suggestions. We extract a small portion of the report which, we think, may prove serviceable to those who are in doubt as to the proper officer who should be appointed to carry out a fire inquest.

The Committee say:—

“There is no doubt that the causes of a considerable number of fires will never be discovered, as a fire frequently destroys any traces of evidence that might lead to the discovery of its cause; but almost all the witnesses who have devoted any attention to this subject concur in the opinion that an

* TABLE SHOWING THE PRACTICE IN SEVERAL OF THE COUNTRIES ON THE CONTINENT WITH REGARD TO INVESTIGATIONS INTO THE ORIGIN OF FIRES. ARRANGED BY MR. SWINTON BOULT, MANAGING DIRECTOR OF THE LIVERPOOL AND LONDON GLOBE INSURANCE COMPANY.							
QUESTIONS.	HAMBURG.	COPENHAGEN.	GOTHENBURG.	PETERSBURG.	BERLIN.	PARIS.	HAVRE.
1. If any inquiry takes place?	Yes, always, in even the slightest cases.	Yes.	Yes, always.	Yes.	Yes.	Yes.	Yes.
2. If so, how is it originated?	By the police.	Police.	Police.	Police.	Police.	Insurance Company.	Police.
3. Before whom conducted?	Chief of police.	Police Superintendent.	Police.	Police.	Police.	Judge of Peace.	Police.
4. Whether the inquiry is compulsory in all cases, or only to be held in doubtful or suspicious cases?	Compulsory in all cases.	Compulsory in all cases.	Always compulsory.	Compulsory in all cases.	Compulsory in all cases.	—	Compulsory in all cases.
5. How is the evidence obtained; that is, whose duty is it to make the inquiry searching?	Police.	Police.	Police.	Police.	Police.	Insurance Companies.	Police.
6. In the event of a fire being pronounced suspicious, or of an individual being indicated as having caused the fire, what is the next proceeding?	The police take possession, arrest the suspected and prosecute.	The case is handed over to the Criminal Court.	The suspected is imprisoned and tried.	The case is transferred to the Court of Trial.	The Attorney-General prosecutes before a Criminal Court and arrests the suspected if he thinks proper.	—	Public Prosecutor institutes an investigation.
7. If an inquiry takes place, and the property is insured, is the settlement of the claim deferred until the termination of the inquiry?	Yes; neighbours sustaining losses, and free from suspicion, need no certificate.	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.

inquiry made into all fires would have the effect not only of discovering the causes of many fires at present unknown but of reducing the gross number of fires. Though in London and Liverpool some inquiry is made by the police or fire brigade, for their own satisfaction, into the origin of the fires, it is not of that searching character to elicit the whole truth; nor is it possible that it can be of this character, for those conducting the inquiry are not invested with sufficient powers for so doing. Mr. Clint, Chairman of the Watch Committee in Liverpool, stated in evidence that the police in Liverpool always inquired into the origin of fires, but that they often failed in discovering the cause, and that, too, when they have had strong suspicions that the fire was wilful, "because they cannot examine anyone on oath." The inquiry, therefore, should be made by some duly qualified officer having the power to examine witnesses on oath. Your Committee, in recommending that an inquiry should take place into every fire, would direct attention to three stages, into which, in so far as respects England, the inquiry should be divided: 1st, The initiatory stage, to be made by the police or fire brigade, who must be instructed and charged to do it, and if anything the least suspicious is observed about the fire, it will be their duty to report it to an officer authorised to make inquiry; 2nd, This officer shall conduct the second stage of the inquiry by examining witnesses on oath, and, if he think proper, empannelling a jury, so as to discover whether the fire is suspicious or not, and, if suspicious, on whom the suspicion can be fixed; if the evidence is not strong enough to implicate anyone in particular, the inquiry will terminate; but if there are strong grounds for suspecting anyone he will be prosecuted before the ordinary Criminal Courts, to be dealt with in the same way as any person accused of crime; this will constitute the third stage of the inquiry. The question to consider, then, is who shall be the officer to whom the police shall report the case for the second stage of the inquiry. Several suggestions have been made to your Committee by the witnesses; some suggest the Coroner, others the police magistrate, and a third party the appointment of an officer similar to the fire marshals in America. Your Committee, after giving due consideration to this subject, would prefer the police magistrate or Coroner to the fire marshal, mainly because in the courts of these two officers they have a ready-made machinery, and they, such being the case, are averse to the recommendation of the creation of any new offices; and they would recommend the Coroner to carry out the second stage of the inquiry in preference to the police magistrate, because the Coroner's court is a moveable one, and he can constitute his court and conduct the inquiry in the immediate vicinity of the fire, and because, till of late, he was generally considered to have the power of inquiry into fires, and such power was exercised by some Coroners. Your Committee would recommend that he should be paid for conducting the inquiry partly by fees, and partly by salary, out of the rates. They do not think that the Insurance Companies should be called upon to pay any part of the expense, as it is not the duty of

any private commercial company to prosecute for a public crime, and besides, the fire may take place on property not insured. . . . And they would specially recommend that no claim should be settled by any Insurance Company without a certificate from the police, or fire brigade, or officer appointed to conduct the investigation into the origin of the fire ; but this certificate should not debar the Insurance Offices from opposing the claim if they think proper."

According to the evidence of the late Mr. Serjeant Payne, Coroner of the City of London and of the Borough of Southwark, taken before the Fire Committee,* the Court of Common Council approved of the reports, and paid the expenses of the Coroner for holding fire inquests until the year 1850, when they ceased to do so because they thought it was not legal.

An application was made after that time (in 1851) to the Coroner to hold an inquest on the cause of a fire at Messrs. Wigan & Wood's, the great hop merchants in the Borough ; the Coroner agreed to hold the inquest if Messrs. Wigan & Wood would pay the witnesses for their attendance ; and this they readily agreed to do. The inquest was held, and the verdict was, that the premises were set on fire wilfully, and the Secretary of State offered a reward to discover the guilty party. In the first instance, the officer of the neighbourhood where a fire had taken place—the police officer, or the ward officer—informed the Coroner of it ; sometimes the Coroner was informed by a letter signed by a great many of the neighbours, if there was anything very suspicious.

The effect of the holding by Mr. Serjeant Payne of inquests into the causes of fires during five or six years was as follows :—In the year 1845-6 there were 11 inquests, two of the fires were wilful, six accidental, and three, cause unknown ; in 1846-7 there were nine inquests, one of the fires was wilful, three accidental, and five, cause unknown ; in 1847-8 there were sixteen inquests, two of the fires were wilful, eight accidental, and six, cause unknown ; in

* *Minutes of Evidence*, p. 161.

1848-9 there were 22 inquests; three of the fires were wilful, ten accidental, and nine, cause unknown; in 1849-50 there were thirteen inquests, one of the fires was wilful, seven accidental, and five, cause unknown.

In one of the cases of arson, which was in Bermondsey, two men, the tenant of the house and his brother, were convicted, and transported for life. The conviction would never have taken place had it not been for the Coroner's inquest. In that case, the tenant set fire to his own house.

In former days a man was never supposed to burn his own house for the sake of destroying it; it is only since Insurance Offices have been established that men have for that purpose burnt their own houses. The Coroner's jury returned a verdict that the two men had wilfully set fire to their house. Mr. Serjeant Payne said to the Insurance Office, "You hear what the jury say; you will, of course, order these men into custody, take them before the magistrate, and have them committed:" but the Insurance Company replied that they had no instructions, and could not do so. The men were at large. A Police Magistrate read the account, and sent for the police, and he said, "How is this? Here is a case of arson, and nobody has been apprehended, bring the men before me." They were arrested, committed for trial, indicted, convicted and transported for life; all this was the result of the Coroner's fire inquest.

The West of England Fire and Life Insurance Office in Manchester, in November, 1848, wrote to Mr. Serjeant Payne thus:—"Seeing how much public good arises from the fact of holding inquests upon fires with a view of discovering their origin, we are very desirous of inducing our Corporation to hold similar inquests through their Coroner, and for that purpose have, in common with several other Insurance Companies, sent in to our Town Clerk a

requisition to that effect." At the same time a correspondent of the *Lincolnshire Herald* writes :—" Let me avail myself of a corner of your widely-circulated paper to explain the great service rendered by Messrs. Edwards & Fricker in conducting the investigations which discovered the perpetrator of one of those diabolical outrages which have lately disgraced our neighbourhood. To these Coroner's inquests alone is to be attributed this very satisfactory result, and I can scarcely express the extent to which it has relieved the minds of many innocent persons liable to be suspected. For the last two or three weeks our position with respect to our labourers has been most painful, doubt and distrust on one side, and on the other innocence, without the capacity of clearing itself from suspicion of guilt." Lord Denman wrote a long letter to Mr. Serjeant Payne, in which he said : " Long before I heard of the suggestion that Coroners should inquire respecting fires, it had occurred to me as a most desirable improvement, and I rather think I mentioned it to Sir James Graham." An agent of one of the Fire Offices wrote to Mr. Serjeant Payne, " In a village in Cambridgeshire there were eleven fires in as many months, and no sooner was the insurance money paid in one case than another happened ; but as soon as they got the Coroner to follow the example of the Coroner of London, and hold inquests, the fires altogether ceased." Another agent said to him, " These inquiries have been the means of saving the Insurance Offices many thousands of pounds." Dr. Thackeray said, " I have been present at various fires, but the farmers are always unwilling to mention their suspicions lest they should become victims to their labourers, but a jury could have no such fears."

The Minutes of Evidence contain abundance of information on this interesting subject. They are especially interesting because they are taken from the mouths of the very persons who had held fire inquests. The best witness,

however, was Mr. Serjeant Payne, whose evidence we have just dealt with. Next to him, the better witness is Mr. John Humphreys, Coroner for Middlesex. This gentleman stated that during one year prior to 1860 he held four or five inquests on fires.* One of these inquests was at Tottenham. Every Saturday night they had a fire in that parish, until it attracted the attention of the overseers and churchwardens, and they determined to do something. The next time a fire happened, application was made to Mr. Humphreys to hold an inquiry. He requested that a formal communication should be made to him by the churchwardens, or else that some ten or dozen inhabitants should request him to make the inquiry. The result of this was that the Insurance Office defended an action brought by the person insured; the Insurance Office, nevertheless, although it was said to know that the person insured had wilfully raised the fire, and although it had succeeded before two juries, viz., the Coroner's Jury, and a Special Jury in the Court of Queen's Bench, nevertheless refused to prosecute. The man was left unpunished; but the inquiry had the effect of immediately lessening the number of fires. There was another case in St. Luke's: there Mr. Humphreys was applied to by an Insurance Office to hold an inquest, and the Insurance Office resisted the claim successfully; but they did not prosecute. Again, in Mile End, there was a case fraught with great suspicion, and no claim was made against the Assurance Company. In that instance the evidence of guilt was very strong; the wife of the householder had escaped apparently in her night-dress, but when she was discovered on the top of an adjoining house she was found to be dressed, her stays on, and having her gold watch and chain, with merely a nightgown over her dress. The man, however, was never prosecuted, and the crime went unpunished.

* *Minutes of Evidence*, p. 158.

The practice of holding fire inquests as in England also obtained in Scotland in 1832. In that year the Sheriff Depute of Lanarkshire gave orders that, in consequence of the frequency of fires, every case, without exception, should be investigated before him, or before some competent authority, through the Procurator Fiscal. The immediate consequence of that was to put a stop to the frequency of fires. But the then Lord Advocate, Sir William Rae, having refused to allow the expense of such investigations in Exchequer, unless there were good grounds for supposing that the crime of wilful fire-raising could be brought home to any person, joined to his desire to relegate such investigations to magistrates of burghs, the investigations stopped altogether. However, in 1866, Lord Advocate Patton directed the Procurator Fiscal to revive these investigations.

It is a matter of regret to us that, so far as England is concerned, the wholesome practice of the holding of inquisitions by Coroners respecting the origin of fires received a severe blow from the decision of the Court of Queen's Bench in 1860. In that year a prohibition was applied for to restrain William Herford, Coroner of the City of Manchester, from holding an enquiry on the origin of a certain fire in that city. The Chief Constable had suggested to the Coroner the propriety of holding an inquest. The Coroner accordingly issued a precept to him to summon a jury, and proceeded with the inquest in due course. In doing this, the Coroner was acting solely upon the suggestion of the Chief Constable, and from a regard to his duty as Coroner, and in the public interest.

The owner of the premises which had caught fire (a dealer in india-rubber and macintosh goods) was called upon to attend the inquest. He did so, accompanied by counsel who objected that the Coroner had no power to hold an inquest concerning a fire. The dealer was nevertheless

examined, and the inquiry was adjourned. Pending the adjournment, however, he obtained a rule from the Court of Queen's Bench prohibiting the holding of the inquest. The matter was argued before the late Lord Chief Justice Cockburn, Mr. Justice Wightman, Mr. Justice Crompton, and Mr. Justice Blackburn. The learned Judges determined that a Coroner who holds an inquest on a fire acts beyond the proper limits of his office and jurisdiction ; they based their judgments, 1st, on the authority of Lord Coke, Lord Hale, and Chief Baron Comyns, and 2ndly, on the fact that they thought that from the time of Edward I. down to the last twenty years preceding their judgment, there was an uniform abstinence from the exercise of such jurisdiction by a Coroner.

To this it may be replied, taking the second objection first, that Coroners have undoubtedly been very remiss in doing their duty, particularly when they have not been in receipt of any emolument or reward for doing it. This appears from the Statute 3 Hen. VII., cap. 1., which, reciting that as Coroners had not nor ought to have anything by the law for doing their office, which has often been the occasion for Coroners having been remiss, ordains that a Coroner shall have for his fee upon every inquisition taken upon the view of the body slain, 13 shillings and 4 pence ; further, that for every default in making inquisitions upon view of the dead body, the Coroner shall forfeit to the king 100 shillings. Thus it appears that in little more than 200 years after the passing of the famous Statute *De officio Coronatoris*, the Coroners had become so remiss and negligent in doing their duty as to require legislation which urged them to do their duty, both by the reward of payment and the fear of a heavy fine. This legislation applied only to inquisitions "on a dead body." Is not this evidence that there were inquisitions by Coroners which were not on dead bodies but on other

matters? This may also afford us a reason why inquisitions on dead bodies were kept up, and why inquisitions on other matters were suffered to drop. If such negligence occurred 200 years after the Statute *De officio Coronatoris*, can we be surprised if the jurisdiction is altogether denied 500 or 600 years after the passing of that Statute? Clearly the jurisdiction has been dormant, or but little exercised, nevertheless the law has not been altered by the Legislature. It is to be regretted that the Statute of Henry VII. was not brought to the notice of the learned Judges who decided the legal question.

But the fact of non-exercise of the jurisdiction was merely auxiliary to the first point—the main point—on which the learned Judges based their decision. The main point which determined the decision in the *Queen v. Herford* was the authority of Lord Coke, of Lord Hale, and of Chief Baron Comyns. And first as to Lord Coke.

Coke says, in his note to cap. 17 of Magna Charta (2 Inst., 31): "What authority had the Sheriff in Pleas of the Crown before this Statute (Magna Charta)? . . . To inquire of all felonies, by the Common Law, except the death of man. And what authority had the Coroner? The same authority he now hath, in case when any man come to violent and untimely death, *super visum corporis*, &c., abjurations and outlawries, appeals of death by bill, &c."

Let us now examine the authorities on which Lord Coke founded the above proposition. They are as follows: The *Mirror of Justices*, cap. 1, § *Coroners*, and cap. 3, § 2; *Bracton*, lib. 3, fol. 121; *Britton*, cap. 1, fol. 3; *Fleta*, lib. 1, capp. 18, 25; 22 *Liber Assisarum*, 97, 98; 3 Hen. VII., cap. 3; Staunford, *Pleas of the Crown*, 64, 116, 117.

First, *The Mirror*. This work was written, or edited, by Horne, certainly before the seventeenth year of the reign of Edward II., and probably in the reign of Edward I.,

and, from the reference of the writer to modifications made in the earlier laws by Magna Charta and by other Statutes, it is evident that he was explaining what the laws of England were at the time when he wrote, and not writing (as it was suggested in the *Queen v. Herford*) of the laws of the Saxons. Speaking of Coroners, he says: "To their office belongs for each Coroner in his own bailliwick to take a view of arsons" (*al office appent a veier les arsons chacun en sa baillie*). . . . "They take inquests of felonies happened in their bailliwicks. . . . They are wont to come to cases of arson, and to inquire who they were who set fire, and how it was done." (*De prendre enquest des felonies aventures en leur baillies . . . aux arsons solent venire et enquirer qui eux y ministrent le feu et coment.*) The same expressions are employed by the writer with respect to dead bodies, to treasure trove, and to wreck of the sea.

This authority, so far from denying the power of a Coroner to hold an inquest on fires, absolutely affirms it.

The next authority quoted by Coke is Bracton. Bracton only says that, "as soon as they (the Coroners) have received a mandate from the bailiff of the lord the King, or from other good men of that neighbourhood, they ought to visit the slain, or the wounded, or the drowned, or those who have died suddenly, and the breakages of houses, and the places where treasure has been said to have been found . . . and order four, five, or six neighbouring townships that they come immediately before them, and by their oath make an inquest concerning the men slain." He afterwards speaks of inquiring concerning fugitives, drowned persons, and treasure trove.

This authority is imperfect; for he does not proceed to tell us what the Coroner is to do when he has visited the wounded, and the breakages of houses. Nor is it until later that he speaks of inquiry concerning drowned persons and treasure trove; and, for the first time, of fugitives

from justice. Presumably, the Coroner is to hold an inquiry into the breakages of houses; but Bracton does not say so in words.

The next authority of Lord Coke is Britton.

He says: "Also we will, when any felony or misadventure has happened, or if treasure be found underground and wickedly concealed, and in case of rape of women, or of the breaking out of prison, or of a man wounded near to death, or of any other accident happening, that the Coroner do speedily cause to appear before him at the place where the accident happened, the four adjacent townships, whereby he may enquire of the truth of the casualty. . . . Those who are summoned and come not to the Coroner's inquest shall be at our mercy at the coming of our Justices." Again, he says: "We forbid every Coroner upon pain of imprisonment and heavy ransom to make his inquests of felonies, accidents, and other things belonging to his office, by procurement of friends." He also refers to the Coroner's inquest on rape, treasure trove, wreck of the sea, and royal fish.

The next authority is Fleta, that is to say a book so named, written in the time of Edward I. This work speaks (c. 18) of persons being appointed to ascertain whether Coroners did their duty properly, and to empanel a jury to present to them (*inter alia*) "of and concerning all murders, homicides, felonies, who done by, when, and where, whether on land or water, wood or marsh, whether in a town or without, and how they were done during the whole time that the said A. was Coroner for the King in those parts."

According to the last two authorities, Coroners have jurisdiction over all felonies.

The "Book of Assizes" (*Liber Assisarum*) follows. The reference is 22 Ass., 97, 98, but the reference is wrong. That portion of the Book is silent as to Coroners.

The next authority is 3 Henry VII., c. 3. This Statute makes no mention of Coroners. It refers to Justices of the Peace alone.

The last authority is Staunford. This author, after referring to what is known as the Statute "*De officio Coronatoris*" (4 Edward I., st. 2) says: "This Statute as to inquisition to be taken, extends itself entirely to the death of a person, by which it seems that the Coroner cannot enquire of any other felony but of the death of man."

This is a mere opinion of Staunford, and is given as if with much hesitation.

But Lord Coke says something more about the Coroner in the 4th Institute, in his chapter on "the Court of the Coroner," viz.:—"As the Sheriff in his tourn may enquire of all felonies, by the Common Law, saving of death of man, so the Coroner can enquire of no felony but of the death of man, and that *super visum corporis*." He gives us 35 Hen. VI., 2, 3, as his authority for this. Again, this is a wrong reference. There is, however, in the Year Book, 35 Hen. VI., 33 B., something to the point; this is doubtless what he refers to. The case however has nothing to say as to the jurisdiction of Coroners, or of their Courts. There is a passage, a mere *obiter dictum*, stated *arguendo* by Nedham, thus: "For I say that Coroners have power to enquire of no felony except of the death of man; again, in Northumberland, Coroners have power to enquire of all felonies, &c., by custom, as if the Sheriff in his Tourn, and this custom is sufficient enough, for it might have a good beginning, so such a thing may be begun elsewhere."*

* Car je dis que les Coroners n'ont pouvoir d'enquerir de nul felony fors pris de mort de home; encore en Northumberland les Coroners ont pouvoir d'enquerir de tous felonies, &c., per custome, si come le Vicom en son tourn, et c' custome est assez sufficient, car il pourra avoir bon commencement co'e tiel chose peut estre commence a or.

Having read the statements of Lord Coke and the authorities on which they are based, it at once becomes apparent that his authorities do not support the very unhesitating doctrine which he advances.

But the Court of Queen's Bench also relied on the authority of Lord Hale. This learned writer says much the same as Lord Coke, and with reason, for the above recited passage in the 2nd Institute of Coke is his only authority, with the exception of 35 H. VI., 27, 6; the latter reference is a misquotation for 35 H. VI., 33 B., and is strong evidence that Lord Hale was only quoting at second hand, and had formed no original judgment on the text in question.

The authority of Lord Hale, therefore, is little to the purpose.

The third and last authority relied on by the Court of Queen's Bench was Chief Baron Comyns.

This author also follows Lord Coke, but quotes the passage from the 4th Institute (which we have already set out) as his authority. Hale and Comyns, therefore, are only copyists, *pro hac vice*, of the opinion of Coke, an opinion which, as we have already pointed out, is not supported by the authorities which it quotes.

On the other hand, Matthew Bacon, in his Digest, refers to the *dictum* concerning the limited jurisdiction of the Coroner, and puts it no higher than as being "according to some opinions," and not as an opinion in which he concurred.

Hawkins, *Pleas of the Crown* (Bk. 2, cap. 9, s. 21), refers to the statute of Edward I., commonly called *De officio Coronatoris*, and says of it:—"This statute being wholly directory, and in affirmance of the Common Law, doth neither restrain the Coroner from any branch of his power, nor excuse him from the execution of any part of his duty, not mentioned in it, which was incident to his office before."

Hawkins, therefore, is of opinion that there are other parts of a Coroner's duty which are not mentioned in that statute, and that the statute itself is merely directory of a part of the Coroner's office. In affirmance of this he says again (section 35):—"It is expressly said in some books that a Coroner hath no power *ex officio*, to enquire of any felony, but only of the death of a man upon view." He refers to those books as being 27 *Liber Assisarum* 55, and the Year Book 35 Henry VI., 33 B., and he mentions Fitzherbert's *Justice of the Peace*, and Brooke's *Abridgment*, which contain the same substance as the Year Book. He then continues:—"Yet it is expressly declared by the above-mentioned statute, *de officio coronatoris*, that a Coroner ought to enquire of the breakers of houses, and it is said by Britton that he may enquire of rape and of the breach of prison, and such power hath never been expressly taken away from him: it seems hard to say that he may not still make such enquiries if he please, for as to the authority of 27 *Assisarum* and 35 Henry VI. which are cited for the maintenance of the contrary opinion, it may be answered that this point is not resolved in either of those books, but only spoken of incidentally; for the very point resolved in 27 of Assizes seems to be no more than this:—That a Coroner hath no power to take an indictment of an accessory after the fact: and that which is said in 35 Henry VI. concerning this matter is only brought in by way of argument, concerning a point of quite a different nature."

We have already stated what is contained in the passage from the Year Book of 35 Henry VI. The book of Assizes says that "a Coroner entered his indictments in the King's Bench that a certain man taken for felony was conducted to a church by certain friars, &c., and that they might be arrested, and because the Coroner has no warrant to receive an indictment unless on the body being present, or

by the command of a writ, a writ was issued to the Coroner to show if he had any other warranty for his act, or none." Even when taken in its most adverse sense, the above passage admits that a Coroner may, by command of a writ, take indictments concerning other matters than death. This is the authority on which Lord Coke builds up his assertion that "a Coroner can inquire of no felony but of the death of man."

Lord Coke is copied in his opinion by Lord Hale and by Chief Baron Comyns. The learned Judges of the Queen's Bench, conceiving the opinions of the three writers to be built on their own researches, and therefore to be distinct authorities, hesitated but little in arriving at an adverse judgment. It is open to doubt whether such judgment would have been given had the learned Judges been aware that they were founding their decision, not on three distinct authorities, but on the opinion of Lord Coke alone, copied by the other two. Lord Coke's opinion itself, as we have already shown, is based upon very insufficient materials.

There is no doubt whatsoever that the Coroner held Pleas of the Crown before the grant of Magna Charta by King John. The 24th Chapter of the Charta enacts that "no Sheriff, Constable, *Coroner*, or other our bailiffs shall hold Pleas of the Crown." By this chapter, therefore, they were prevented from doing so for the future. "At Common Law," said Mr. Baron Bayley, in *Garnett v. Ferraud* (6 B. & C., p. 620), "the Coroner had power to hear and determine felonies; at that time, therefore, his Court was analogous to the ordinary Courts of Law; but his powers were abridged by Magna Charta, c. 17."* The object of this enactment was to abridge the powers of the inferior officers in order that all criminal charges, which exposed

* *i.e.*, c. 17 of the Charta, 9th Henry III., which is identical with c. 24 of John.

the party accused to peril of life, limb, or imprisonment, should be tried before the King's Justices, who were men of learning and experienced in the laws of the realm. Although Magna Charta took away the power of the Coroner of holding Pleas of the Crown, that is of *trying* the more important crimes, there was nothing to forbid him from continuing to *receive accusations* against all offenders. This he did, and continues to do to the present day, without challenge, in cases of sudden or unexplained deaths. Nor is it denied that he has done so and may do so in other matters, such as in treasure trove, wreck of the sea, and deodands. The difficulty, of course, is to know whether the Coroner was or was not in the habit of holding inquests on fires. There is no evidence that he had not the *power* to do so. On the contrary, we think the extracts from the ancient writers which we have before quoted, are on the whole in favour of his having that power. Before Magna Charta he had the power to try all serious crimes; arson would unquestionably be one of them. Magna Charta only took away his power of trying them, not of making a preliminary investigation, otherwise an inquest. This is all that we are contending for. It should further be noticed that arson at Common Law means the malicious burning by a man of the house or premises of *another* man, and not the burning of his own. Before the days of fire insurance, such a deed obviously would not be perpetrated on his own. Nevertheless, if a man set fire to his own house in a town for the purpose of injuring his neighbour thereby, such an act would have been deemed within the meaning of arson. No statute has followed Magna Charta to take away or abridge the right of a Coroner to hold a preliminary investigation on serious crimes. The power may not have been exercised very frequently, for the simple reason that fires were not extensive, serious, or every-day events. But we think that the Common Law right remains.

The famous Statute, *De officio Coronatoris*, says, "these are the things to be enquired of by the Coroner. . . . First, he shall go to the places where any be slain, or suddenly dead or wounded, or *where houses are broken*, or where treasure is said to be found." It deals with wreck of the sea, and with deodand in another part. Mr. Tomlins, the learned editor of the Statutes at Large, says of this Statute, "the abrupt ending leads to the conjecture that this is a minute of a Law or Statute more full in its nature, and perhaps more general in its extent." The Statute is acknowledged by all to be merely affirmatory of the Common Law of the realm, and is by no means a new legislation. It is quite possible that the words, "where houses are broken," refers to the practice of the Coroners of holding inquests on houses which had succumbed to fire, to hostile devastation, or to other causes. If, as Mr. Tomlins suggests, the Statute in question is merely an abbreviation of a larger and more complete document, there is at once an explanation why the duty of the Coroner with regard to "*where houses are broken*" is not more fully dealt with. Be that as it may, however, the Statute in question, being merely affirmatory of the unwritten Common Law on the subject, affords us evidence that one of the Common Law duties of the Coroner was in relation to "*where houses are broken*." This, added to the writings of the early authors on English Law which we have already cited, should yield a strong presumption in favour of the power of the Coroner at the present day.

The case of the *Queen v. Herford*, which denied the power of the Coroner to hold inquests into the causes of fires, was followed in the following year in the Colony of New South Wales, by the passing of an Act enabling the Coroner of the place where any property, real or personal, is damaged by fire, to make an inquisition into the cause and origin of such fire.

There is great reluctance on the part of Assurance Companies to prosecute a searching inquiry in a case of fire. Each office looks on such duty as being the duty of all the offices, rather than the duty of one alone. The competition between the offices is very great and an office is naturally fearful of damaging itself in the eyes of the public by being too inquisitive, or by being too minute in its inquiries before paying over the sum assured. Therefore, as matters stand at present, the Companies are frequently victimised, and the public at large are put in peril. In his report for 1885 Captain Shaw states that the origin of 659 fires in the Metropolis during the year was unknown. That is to say, more than one-fourth of the total. It appears to us that this intolerable condition of affairs might be immediately ameliorated, if not altogether cured, by a short Act of Parliament, which, while removing the effect of the adverse decision in the *Queen v. Herford*, should reinstate the Coroner in his former power, adding some of the wisdom of modern legislation to the practical good sense of our remote ancestors.

SHERSTON BAKER.

III.—THE LAW OF TORTS.

THE literature of the Law of Torts * has been considerably added to during the last two years: we have already very recently reviewed Mr. Piggott's *Principles of the Law of Torts*, and Mr. Ball's English edition of Bigelow's *Leading Cases on the Law of Torts*, and now we have another entirely new work on the same subject by the Corpus

* *The Law of Torts*. By FREDERICK POLLOCK, LL.D., &c. Stevens and Sons. 1887.

Addison on the Law of Torts. Sixth Edition. By HORACE SMITH, Esq. Stevens and Sons. 1887.

Professor of Jurisprudence in the University of Oxford, and a sixth edition of the well-known *Addison*. Both these works are companion volumes to the books on the Law of Contracts by the same authors. The Law of Torts had, in England at least, been left in the hands of mere digesters, both students and practitioners being left to grope their way as best they could through the maze of what was in truth a mass of undigested decisions; but both Professor Pollock and his predecessor, Mr. Piggott, have left the well-beaten track of the Digests, and have endeavoured to formulate a system of Principles governing this most important branch of the Common Law. We have already expressed our view that Mr. Piggott has succeeded admirably in this difficult task: we propose now to consider the way in which Professor Pollock has accomplished it.

In the first place, we are not very confident that students will have courage to plunge further into the book than the five pages on which is printed a remarkable effusion addressed to the "Honourable Oliver Wendell Holmes, Junr., a Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts." It is not the Dedication: that comes before it, and is to the memory of "a man courteous and accomplished," of "a Judge wise and valiant," Mr. Justice Willes. Neither is it the Preface, for prefatory remarks follow it under the head of "To the Reader:" to whom else those remarks could be addressed is not clear. The Corpus Professor's letter to the illustrious American Judge might possibly be correctly termed a "sub-dedicatory epistle." It certainly contains some extraordinary statements, and has somewhat the look of an invitation to Judge Holmes to join what might perhaps be termed an International Mutual Admiration Society. The end which all this curious English serves only seems to be to inform the world that both the Judge and the Professor occasionally

make use of the Year Books. Professor Pollock may rest assured that whatever may have been the case when "Manning was as one crying in the wilderness," others besides himself have by this time "learnt to taste the Year Books." The sentence from which we quote is a good illustration of what appears to be "English as she is spoke" at Oxford in the Jubilee year. "It is strange to think that Manning was as one crying in the wilderness, and that even Kent dismissed the Year Books as of doubtful value for any purpose, and certainly not worth reprinting. You have had a noble revenge in editing Kent, and perhaps the laugh is on our side by this time. But if any man still finds offence, you and I are incorrigible offenders, and like to maintain one another therein as long as we have breath; and when you have cast your eye on the historical note added to this book by my friend, Mr. F. W. Maitland, I think you will say that we shall not want for good suit." Another curious example is to be found at the bottom of p. 10.

But we must leave these "Fore-words," and get to the book itself. To a certain extent the book may be said to fulfil its purpose, which is to shew that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts—that this is a true living branch of the Common Law, not a collection of heterogeneous instances; but to a greater extent the book must also, we think, be said to fail in the fulfilment of its purpose. We are entirely at one with the learned Professor in his view that there really is a Law of Torts; the pity is that he has not set that law before us in quite such a satisfactory manner as we could have wished. The general impression left on the mind after reading the volume is that, although many principles are stated with clearness, precision, and accuracy, there is not that linking together of isolated principles by which alone a

proper scheme of the law can be presented ; there is a touch of the unscientific lecture about the whole. We will not go so far as to say that the book is nothing better than a glorified Digest, a mass of cases strung together on a thread of mystic language, but when we find an author in effect describing his work as " answering fire " kindled by Mr. Justice Willes's radiant knowledge, we are led to expect a great deal ; but, not finding this expectation realised, we can offer but little sympathy to the author.

It is natural that, at this time, when the supposed deace of *Thorogood v. Bryan* has been on every lawyer's lips, we should turn to see what Professor Pollock has to say, not only on the special point of " identification," but also on the broad subject of contributory negligence. Now it seems to us that just as the ridiculous word " identification," or even the less absurd one, " imputability," obscured from the learned eyes of Judges for more than a generation the real point at issue, so the words " contributory negligence " have obscured from the Corpus Professor's learned eyes the real drift of the question involved in the subject. In what he has written on this point we catch now and again gleams as from one on the right track, but they are speedily obscured by the consideration of fanciful theories such as " the penal theory of contributory negligence." No such elaborate device as a penal theory, even if it has a substantive existence, is necessary to account for the three propositions of law which are generally collected under the head of " contributory negligence." It does not need a very careful examination of them to see that they are in direct sequence from the principles of remoteness of damage, and that they are in logical sequence among themselves. The Professor falls into the common error of treating contributory negligence as a branch of the Law of Negligence. In this law negligence has a well-defined meaning,—a duty to the

plaintiff,—and a breach of that duty has to be established. But what duty is broken by a plaintiff who has been contributorily negligent? The word in this case is used simply in its ordinary sense, that of recklessness or carelessness. When the glasses were so badly adjusted, it was not to be wondered at that the curious doctrine of identification was so imperfectly brought within the range of legal vision; by the light of to-day, however, its true bearing was not hard to discover. But the doctrine had a bad name, and it was well, perhaps, for it to be hung; possibly, however, a thread would have disposed of its existence as effectually as the massive argumentative chain used in the Court of Appeal. We venture, however, with submission, to point out three things in connection with the decision in the case of *The Bernina*: first, that the question important in all cases of remoteness of damage does not seem to have been asked; secondly, that the Admiralty rule of dividing loss seems capable of satisfactory distinguishment from the ordinary case of contributory negligence; thirdly, that at present there seems not a little doubt as to the real extent to which the decision goes. Further, we may add that Professor Pollock's note on the decision does not appear to us *rem acu tangere*, and that Mr. Horace Smith's "*see also The Bernina*," in a foot-note citing *Thorogood v. Bryan*, seems worse than useless.

A similar want of appreciation of precisely the same point is noticeable in the treatment of the defunct case of *Vicars v. Wilcocks*. The disapproval of the case by the House of Lords in *Lynch v. Knight*, in 1861, failed to crush it out of existence; the erroneous doctrine it laid down seems to have continued as vigorous as ever for twenty years after, and required an emphatic death-blow at the hands of the present Master of the Rolls and Lord Selborne, in *Bowen v. Hall*, in 1881. Professor Pollock does not notice this final refutation of a principle endorsing

a fallacy, which has done more to impede the due formulation of the Law of Torts than any other case we know of. That so unscientific a book as *Addison* should have preserved its references to Lord Ellenborough's decision, and though apparently doubting the soundness of that judgment should have treated the later cases in a confused manner, is perhaps not to be wondered at; but that Professor Pollock should not go further than the mild statement "we may say it is not law," appears to us astounding. The full extent of the fundamental principle, that a man is liable for all the consequences of his act which as a reasonable man he ought to have foreseen (which we hold to be the only way of stating the rule of liability for damage), has not yet been thoroughly worked out by the Courts, and the task can only be accomplished piecemeal, as occasions arise. We have in the Court of Appeal Judges who are marking their tenure of the Judicial office by their strenuous endeavours to bring the Law of Torts (among other branches of the Law) into one perfect and symmetrical whole. The Divisional Courts are too hampered by precedent, the Court of Appeal has naturally fewer precedents to fetter the freedom of its discussion, and the last ten years have seen much good work done, and many closely-reasoned and enlightened judgments delivered. Witness (notwithstanding all that has been said to the contrary), Lord Esher's dissenting judgment in *Heaven v. Pender*, which, again, involved little more than a driving home of the principle we have been discussing to its logical conclusion. We hold, as Professor Pollock holds in theory, but apparently not in practice, that there "is a Law of Torts," and that where, in the multitude of cases still cited as authorities, there are found to be conflicting principles, the weakest must go to the wall, and the sooner they are squeezed out of existence the better.

We have space only to notice one other instance in which Professor Pollock has failed to grasp the full bearing of

principles laid down in important cases in one branch of the Law of Torts on antique principles preserved in other branches of that law. "There is authority," he says on page 208, "for the proposition that where spoken words, defamatory, but not actionable in themselves, are followed by special damage, the cause of action is not the original speaking, but the damage itself." There is abundant authority; but it hardly wants the reference given in the foot-note, "Maule, J., *ex relat.* Bramwell, L.J." It is perfectly true that that eminent Judge did distinctly remember, having been counsel for the plaintiff, a case in which Maule, J., did so rule. But there never was a doubt about it if the proposition is put more correctly thus: the cause of action is the speaking followed by the damage. The law of damage in slander is throughout only an example of the general principle of the Law of Torts, that a tort is not complete until the damage has happened; that damage is presumed by the law in certain cases is not an exception to, but an illustration of, the rule. The elaborate argument in *Backhouse v. Bonomi* would have been completely wasted if the principle which resulted from it were held applicable only to cases of subsidence following excavations. If a "Master of the Common Law" occasionally misses an elementary point, no wonder need be excited at a certain *sancta simplicitas* about the note on page 37 of 7 Q. B. D., "Diligent search has been made for this case, but it has not been found.—REP."

In taking leave of the Corpus Professor's new work, we hope that we may have shewn cause for his reconsideration of some portions of the interesting branch of Law which he has taken as his subject: we can only regret that in speaking of it, we have not seen our way to the employment of those well-rounded phrases which come so readily to the reviewer's pen.

It is too much to hope that *Addison* should be remodelled.

As a Digest of rights, it is a useful book of reference; but we hold that this is an unscientific way of treating the Law of Torts. In looking over the Table of Contents we were pleased to see a new chapter headed "The Justification of Torts," but on turning to it we were grievously disappointed: it is but another fragment of a Digest, and very meagre even from that point of view; it only occupies four pages and a-half. The body of the work has been added to by 64 pages.

IV.—FOREIGN MARITIME LAWS.

TITLE IX.

Privileged Debts [Crediti Privilegiati].

CHAPTER I.

General Provisions.

ART. 666. The privileges [*privilegi*] set out under this Title have priority over any other privilege, whether general* or special,* on chattels [*mobili*] under the Civil Code.

667. Where the article on which there is a privileged debt has deteriorated or diminished in value, the privilege can be put in force against the residue or what is recovered and preserved.

B. Bk. II. 165, F. 327, H. 588, G. 680, 691.

* These are specified in Bk. III., Tit. XXIII., Ch. I., § 1, Arts. 1952—1960, of the Civil Code, and are equivalent to (1) General:—Costs of Creditors' Administration, Funeral Expenses and Medical Expenses for six months before death, Household Supplies and Domestic Wages for last six months, and Rates and Taxes for the previous and current years; (2) Special:—Customs Dues for the goods subject to them, Landlord's Claim for Rent on Crops, Agricultural Labourer for Wages on Crops, Pawnee on Pawned Goods, Artificer's Lien on Goods in his possession for repair, Innkeeper's Lien on Property of Guest for his bill, Carrier's Lien for Transport of Goods for three days after delivery if still in Consignee's hands, a lien on the Guarantee Fund and Wages of Public Functionaries for damages sustained at their hands in the wrongful exercise of their functions.

668. If a creditor has a privileged claim against one or more articles, and another creditor, whose privilege extends to other articles, has a claim ranking higher than his, the former is deemed to be installed [*surrogato*] in the same privilege as belongs to the latter creditor.

Other privileged creditors who would be prejudiced (sustain a loss) in consequence of this substitution [*surrogazione*] have the same right.

This article is so difficult to understand that the actual Italian text is appended. The translation given has been approved by that eminent writer both in English and Italian, Mr. Gallenga, formerly *Times* correspondent.

Il creditore avente privilegio sopra una o più cose, qualora sul prezzo di esse sia vinto da un creditore il cui privilegio si estende ad altri oggetti, s'intende surrogato nel privilegio a questo spettante.

Eguale diritto hanno ancora gli altri creditori privilegiati che rimangono perdenti in seguito alla detta surrogazione.

The difficulty is whether the two debts, for the purpose of this Article, must be of the same class, so far as the object upon which both have a privilege are concerned, or whether it applies where the one having the wider privilege is also, so far as the object in which both have a privilege, of a higher class. It is also to be observed that the next article makes arrangement for the priority *inter sese* of privileged debts of the same class.

For example, if it applies to privileges of different classes, a salvage service to ship, freight and cargo ranks as against cargo (No. 3), see Art. 671; as against freight and ship (No. 2), see Arts. 673, 675, and is always of a higher class than seamen's wages, which rank as against ship (No. 7), see Art. 675, and as against freight (No. 3), Art. 673; if, therefore, such a salvage service is rendered, the seamen would be able to look beyond the ship and freight, and have their privilege extended also to the cargo.

If it only applies to privileges of the same class, its principal effect would be in case of Bottomry Bonds, which rank as to cargo (No. 8, Art. 671), as to freight (No. 6, Art. 673), as to ship (No. 9, Art. 675); where there were several given in the same port, it would make no practical difference if one was on ship alone, one on ship and freight, and one on ship, freight and cargo, as, in each case, on the claim of the person holding the more ample security being proved, those holding the more limited one would be subrogated to his larger one. If, again, the qualification of the next Article is introduced, the effect would be that a prior Bottomry Bond on ship alone would have its security extended to cargo and freight by the fact of a subsequent bond being given which covered those articles as well as the ship.

In a French translation of the Code, by M. Bohl, the difficult passage is

thus rendered:—"Si le créancier, ayant privilège sur un ou plusieurs objets, *"est dépassé sur leur prix* par un créancier dont le privilège s'étend à d'autres objets, *il est censé subrogé dans le privilège* appartenant à ce dernier. Le même droit ont aussi les autres créanciers privilégiés, qui restent en perte à la suite de la dite subrogation." The translator then observes, "that the (doctrine of) civil subrogation is in this instance applied in an excellent way. This Article will afford great facilities for procuring money required for a ship. One may recommend this Italian example to all legislators." It will be seen that neither the translation of the Article itself, nor the note, touches what appears to be the real difficulty, and it is to be hoped that if the Article is adopted by other nations it will be rather more clearly expressed. There is at present no corresponding Article in any of the other Codes, and the Civil Code of France (C.C., Art. 1250 *et seq.*) and Belgium is more analogous to the provisions of the English Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), § 5, that a debtor jointly liable with others to pay a debt is, if he pays it, entitled to be put into the position of the original creditor as regards his co-debtors. In Germany, see G., 681, 762, any such extending of a Bottomry lien is expressly pronounced against.

In England, the practice in the Admiralty Registry, when the proceeds are insufficient to satisfy all claims, is to "marshal the assets," as it is called, though it would appear that to marshal the claims would be a more correct statement; and the law is thus laid down in Mr. McLachlan's *Merchant Shipping*, 2nd Ed., p. 656. "The Court . . . will marshal such assets as are within its control in that way which best meets the just claims of competing plaintiffs, and best protects the interests of separate defendants. If there be two funds in Court, and one of them is subject to the lien of one suitor, and the lien of another suitor covers both, payment of the latter will be directed first out of the fund that is subject only to his own lien, in order that the residue of the fund subject to both liens may be greater for him who has no alternative." It should be added, however, that this is only as between claims of the same rank (see Roscoe's *Admiralty Practice*, 2nd Ed., p. 101), and is similar to the right of "marshalling securities," between rival creditors (see *Aldrich v. Cooper*, 8 Ves., 382), where if one creditor has two funds out of which he can recover, and another only one, the former is bound to exhaust the fund on which he alone has a claim before claiming against the other; and if he fails to do so, the creditor who has but the one fund is subrogated to him in his claim against the other fund *pro tanto*; but in this case both funds emanated originally from the same source, *i.e.*, a common debt, not, as in the case of ships and cargoes, from probably different persons.

669. Privileged debts of the same order share in proportion to their respective amounts [*ammontare*] if the fund is insufficient for all, when they are created at the

same port. But if, when the vessel has resumed her voyage, debts of a similar description are subsequently created, the later debts have priority over the earlier ones.

The expenses incurred by a creditor in bringing in his claim and interest, if payable, for the year last past and for the current year up to the date of the arrest, attachment, or voluntary sale of the vessel, stand on the same footing as the capital sum of the debt itself.

B. Bk. II. 4, F. 191, 323, G. 757, 770—773, H. 313, 314, N. 101, P. 1301, S. 597, Sw. 276, E. 5.

Macl. Ch. XV.; M. and P., 125, 242, 575, 619 (*notes t. 10*) 653; News. § 87.

670. If the document of title [*titolo*] to a privileged debt is "to order," its endorsement [*girata*] transfers the privilege.

This article would, as a rule, only apply to Bottomry Bonds, there being an obvious improbability about the title to any of the other debts being "to order," though they might be assigned.

Cf. B. Bk. II. 162, F. 313, G. 687, H. 573, P. 1632, R. 1062, S. 815, Sw. 130, E. 154.

M. and P. 242 (*note t.*) 573; Macl. 56.

CHAPTER II.

Debts which are privileged on the Cargo.

671. The following debts are privileged on the cargo [*cose caricate*] laden on board a ship, the total amount of each class having priority in the order here stated :

- (1.) Law costs [*spese di giustizia*] incurred on behalf of all creditors in common, in respect of things done to preserve and enforce their claims.
- (2.) The expenses, compensation and charges for salvage [*salvataggio*] incurred during the last voyage, in accordance with the provisions of the Mercantile Marine Code.*

* Art. 21 of this Code allows for salvage, all damages sustained in rendering the service, and salving the ship, or the lives of those on board her exposed to peril, and a sum not exceeding $\frac{1}{10}$ of the value of the property

- (3.) Custom House duties on the goods at the place of discharge [*scaricamento*].
- (4.) The expenses of carriage (freight) and of discharging.
- (5.) Rent for the warehouse in which the goods are put on their discharge.
- (6.) The amount payable for General Average contributions.
- (7.) Premiums of insurance.
- (8.) The amount of capital and interest payable in respect of liabilities contracted by the captain on the cargo, in the case provided for in Art. 509 and with the prescribed formalities.
- (9.) Any other loan on bottomry, or on a pledge of cargo when the person who has made the loan is in possession of the Bill of Lading.

B. Bk. II. 71, 80, 114, F. 280, 428, G. 579, 616, 624, 626, 680, 692, 697, 727, 733, 734, 753, 754, 781, H. 474, 487—490, 547, 548, 566, 584, N. 68, 85, 89, 100, P. 1532, 1535, 1605, 1609, 1655, R. 1036, 1037, 1062, 1178, S. 794, 797, 798, 963, 964, 985, Sw. 109, 115, 135, 140, 167, 182, 281, E. 98, 265.

M. and P. 86, 389—394, 437; Macl. 99, 404, 475—480, 523, 593.

672. The privileges enumerated in the last Article are lost, if no proceedings are taken within a fortnight of the discharge or before the cargo has passed into the hands of a third party.

The ordinary rules established by the Code of Civil Procedure are applicable to the attachment [*sequestro*]

salved. Art. 126 allows salvage to be awarded, taking into consideration the value of the thing salved, the promptitude of the service, and risk incurred. Art. 124 renders all salvage agreements made at sea or at the moment of danger voidable.

None of the other Codes contains a list of debts privileged on cargo, but the claims under heads (4) and (6) are in most cases specially provided for (see notes to Codes, below): (5) is an ordinary possessory lien, and (3) also, exercised by the Government; (2), (8) and (9) are, however, new to most Continental laws, and are most important adaptations from that of England as to Salvage and Bottomry.

arrest [*pignoramento*] and judicial sale [*vendita giudiziale*] of things affected by a privileged debt.

In the particular cases of (4), (5) and (6) there is a similar provision in most of the Codes.

Cf. B. Bk. II. 80, 81, F. 307, freight only, G. 624, 30 days, H. 490, 20 days, P. 1535, do., S. 798, a month, and even in the hands of a third party 8 days, Sw. 283, no privilege after discharge, E. 126, 127.

CHAPTER III.

Debts which are Privileged on Freight.

673. The following debts are privileged on the freight [*nolo*], and rank against its amount in the order stated below:—

- (1.) Law costs incurred in the common interest of all the creditors in preserving and enforcing their claims.
- (2.) The expenses, compensation, and charges for salvage due for services rendered during the last voyage, in conformity with the provisions of the Mercantile Marine Code.*
- (3.) Wages, perquisites [*emolumenti*], and compensations due, in conformity with the provisions of Title III. of this book, to the captain and other members of the crew, for the voyage in respect of which the freight is carried, as well as repayments due to the Mercantile Marine Sick Fund [*cassa degli invalidi della Marina Mercantile*] in respect of the same voyage.
- (4.) Contributions payable to General Average.
- (5.) Insurance premiums.
- (6.) Capital and interest due on Bottomry bonds or freight

* See Note (*) to Art. 671.

The other Codes contain no special list of privileged debts on freight, but, as a rule, the owner is liable on the master's contracts, and for his *quasi-delicts*, and frees himself from this liability by abandoning the ship and freight. Many of the Codes, however, give seamen a special privilege on freight for their wages.

entered into by the captain in the case provided for by Act 509, and with the formalities prescribed.

- (7.) Compensation to shippers for short delivery [*mancanza di consegna*] of cargo, or for damage to cargo which has been sustained through the default of the captain or crew during the last voyage.
- (8.) Any other debt, secured by Bottomry or by a pledge [*pegno*] of the freight, copied and noted on the ship's register.

Cf. B. Bk. II. 7, 63, 71, F. 216, 271, G. 451—454 (1872), 681, 759, 761, 774, H. 321, 451, 452, 574, 578, N. 37, P. 1339, 1496, 1497, 1642 diff., R. 919, 986 S. 622, 716, 722, Sw. 43, 128, 275, 280, E. 30, 74, 89, 98, 158 diff. In English law a Maritime lien on ship usually includes freight, but the lien on the latter is more easily lost than on the former by *laches* in arresting it.

CHAPTER IV.

Debts which are privileged on the ship.

674. Ships and shares [*porzioni*] in ships are bound, even when in the possession of a third party, for the payment of debts which the law declares privileged, in the measure and within the limits stated below.

B. Bk. II. 3, F. 190, 196, G. 758, H. 312, P. 1298, S. 599—602, Sw. 275, 277, 278, E. 4.

675. The following debts are privileged* upon the ship, ranking against its value in the order stated below :

- (1.) Law costs incurred in the common interest of all creditors in preserving and enforcing these claims against the ship.
- (2.) Expenses, compensations, and charges, due for salvage† services rendered during the last voyage, in

* It is to be noted that "damage by collision" gives no privilege in Italy; indeed, Belgium, Norway, and Sweden, are the only Continental states in which it does confer a privilege, and even in these it comes very low.

† Salvage occupies a much more advantageous place in this Code than in any other, it being generally relegated to a place which would be represented here between Nos. 6 and 7, though, as to amount, the Italian law is much less liberal than the practice in England and elsewhere, never, even in the case of derelict recovered out of sight of land, exceeding one-eighth of the value. See M.M.C., Art. 134, *post*.

conformity with the provisions of the Mercantile Marine Code.

- (3.) The Navigation dues sanctioned by law.
- (4.) Pilotage, watchmen's wages, and expenses of watching the ship subsequent to its arrival in port.
- (5.) Rent for warehouses in which the ship's apparel and furniture are stored.
- (6.) The expenses of keeping up the ship and its apparel [*attrezzi*] and furniture [*arredi*] subsequent to its last voyage and arrival in port.
- (7.) Wages, perquisites and compensation due, in accordance with the provisions of Title III. of this book, to the captain and any other member of the crew for the last voyage, as well as repayments due to the Mercantile Marine Sick Fund in respect of the last voyage.
- (8.) Contributions payable to General Average.
- (9.) Capital and interest due on Bottomry bonds entered into by the captain for necessities for the ship in the case provided for by Art. 509, and with the prescribed formalities.
- (10.) Premiums of insurance on ships and appurtenances [*accessorii*] for the last voyage, if the vessel is insured for the voyage, or by a time policy [*a tempo*] and for steamships performing a regular periodical service and insured by time policies, the premiums corresponding to the last six months, and besides in Mutual Assurance associations, apportionments and contributions for the last six months.
- (11.) Compensation due to shippers [*noleggiatori*] for short delivery of cargo, or for damage to cargo sustained through the default of the captain or crew during the last voyage.
- (12.) Unpaid purchase money of the ship due to the vendor.
- (13.) The debts classified under Clause 9 [*suprà*], when

not copied and noted (on the ship's register) with diligence, and any other bond on bottomry [*cambio marittimo*] of the ship, and debts in respect of which the ship is pledged.

Where there are several concurrent claims of the classes specified in Clause 13 [*suprà*] : then priority is determined by the date of the copy of the title, and of its being noted in the ship's register [*atto di nazionalità*].

B. Bk. II. 4, F. 191 (1874), 27, G. 757, H. 313, 315, N. 79, 101, 105, 106, P. 1300, 1302, S. 596, Sw. 49, 172, 275, 276, E. 5.

The liens on a ship recognised by English Law may be divided into four classes :

- (1.) *Maritime*, including those of Salvors, Seamen for wages, and persons injured by a collision on the High Seas, against the other ship.
- (2.) *Statutory*, including those against a foreign vessel, of which no owner is domiciled in England or Wales, for damage to cargo carried into an English Port (24 Vict., c. 10, § 6), for necessities supplied elsewhere than in the ship's home port (3 & 4 Vict., c. 65, § 6; 24 Vict., c. 10, § 5), wages earned on a special contract, and Master's disbursements (24 Vict., c. 10, § 10), towage (3 & 4 Vict., c. 65, § 6).
- (3.) *Possessory*, including those of a material man for repairs, and of a Dock Company for dues so long as the vessel remains in their hands.
- (4.) *Statutory Maritime*, or *quasi-Maritime*, including those against a wrong-doing vessel for damages done within the body of a county (3 & 4 Vict., c. 65, § 6; 24 Vict., c. 10, § 7), salvage within the body of a county (3 & 4 Vict., c. 65, § 6), life salvage (17 & 18 Vict., c. 104, § 458; 24 Vict., c. 10, § 9), Master's wages (17 & 18 Vict., c. 104, § 191).

For the order in which these various liens rank, both against the ship, and *inter sese*, see MacLachlan on *Merchant Shipping*, Chap. XV.

676. An indorsee [*giratario*], transferee [*cessionario*], legal substitute [*persona surrogata*], or a creditor who has received in pledge a debt secured on the ship already copied and entered (on the register), may have the endorsement, transfer, substitution, or that which constitutes the pledge, noted on the registry of the Maritime Administration and on the ship's register.*

* See Art. 76 of the Order for putting the Commercial Code in force, *post*. There is no similar provision to this in the other Continental Codes; it appears to be a very advisable provision in view of Arts. 668, 670, *ante*.

677. The privileges enumerated in the preceding articles cannot be enforced unless the debts are proved and the privileges preserved as follows :—

- (1.) Law costs, by the scale of charges decreed by the proper Judge in the form established by the Law of Procedure.
- (2.) Expenses, compensations, and charges for salvage and pilotage by the depositions on oath of the Administration of the Mercantile Marine or by such other proof as the Judicial Authority shall deem admissible under the circumstances.
- (3.) Navigation dues [*tasse di navigazione*], by the legal receipts of the proper authorities.
- (4.) The wages of watchmen and expenses of watching mentioned in Art. 675, Clause 4, and the debts enumerated in Art. 671, Clause 5, and Art. 675, Clauses 5 and 6, by means of statements of accounts approved by the President of the Tribunal of Commerce.
- (5.) The wages and perquisites of the captain and crew by the lists of shipment and discharge [*ruoli di armamento e di disarmamento*] (of the crew) extracted from the office of the Mercantile Marine Administration; other compensations by the report of the captain and by other evidence of the circumstances which give a right to this. The repayments to the Mercantile Marine Sick Fund by the accounts ("*deconti*") drawn up in accordance with provisions of the law and special regulations.
- (6.) The debts due for General Average contribution by the General Average statement of apportionment [*ripartizione*].
- (7.) The debts mentioned in Art. 671, Clause 8, Art. 673, Clause 6, and Art. 675, Clause 9, by means of declarations [*processi verbali*], signed by the principal

members of the crew, the formal authorisation [*decreti di autorizzazione*] of the accounts, signed by the captain and approved by experts, receipts and declarations signed by him (the captain), or by any other documents which prove the necessity of the expense.

- (8.) Premiums of Insurance, by the policies of insurance, by the "slips" ("*buoni*"), or other documents signed by the assured, and by extracts from the books of regular insurance brokers [*mediatori di assicurazione*], the apportionments and contributions in the case of Mutual Assurance associations by extracts from the registers shewing when ships are admitted into it.
- (9.) Compensation due to shippers by the judgments which decide this amount, if judgment ordering the repayment of the damage has been pronounced at the time when the proceeds of the ship are distributed, but, if the amount is not then ascertained, then according to circumstances, either all the creditors who claim compensation may settle for a lump sum approximate in amount [*somma approssimativa*] thereto and give security to repay any excess, or the creditors ranking below them may settle in the same way, giving security [*cauzione*] to repay if necessary.
- (10.) The sale of a ship, by the Bill of Sale copied out and noted in the manner prescribed in Art. 483.
- (11.) The debts mentioned in Art. 671, Clause 9, Art. 673, Clause 8, and Art. 675, Clause 13, by the vouchers [*scritture*] relating to those copied and noted in the manner prescribed.

B. Bk. II. 5, F. 192 (1874) 27, S. 598, E. 6.

678. Independently of the ordinary way in which legal obligations are extinguished, the privileges which creditors have against a ship are extinguished :—

- (1.) By a sale by order of Court, at the instance of

creditors, or for any other cause, with the formalities prescribed in Book IV., and after the proceeds on to which the privilege is transferred are paid out.

- (2.) By three months' lapse of time [*decorso*] in the case of a voluntary transfer [*alienazione*] of the ship. This term runs from the date of the document of transfer being entered (on the ship's register), if at the time of the transfer the ship is within the limits of the department [*compartimento*] where she is registered, and from the date of her return into the said department, if the transfer is entered after the ship has sailed, provided that the sale is notified to the privileged creditors, whose titles to claim are found entered and noted on the ship's register within one month of the entry (of the transfer). There is no extraction of the debt where a creditor who has a privilege has before the end of this term summoned the purchaser before the Court to get a formal declaration of his privilege.

B. Bk. II. 6, 237, former Code 193, 197, F. 193, 197, G. 767—769, H. 316, 319, N. 79, P. 1307—1309, S. 600, 601, Sw. 275, 277, 278, E. 7—9.

A Maritime lien may in England be lost by *laches* in enforcing it, and is purged by a sale by the Court of Admiralty. A Statutory lien appears only to attach so long as the vessel does not change hands (*The Heinrich Bjorn*, 11 App. Cases, 270). A Possessory lien is only in force so long as the claimant retains possession. Maritime liens by Statute appear to have the same incidents as ordinary Maritime liens.

679. The person who acquires a vessel, or a share in a vessel, must, to clear (his property) from liability for privileged debts for which he is not personally responsible, notify to the creditors, before the vessel is seized [*pignorata*], or arrested [*sequestrata*], a document containing:—

- (1.) The date and nature of his title, and the date of its entry (in the register), and of its being noted on the ship's register.

- (2.) The name and surname of his transferor [*autore*] :
- (3.) The name, description, and burden of the ship :
- (4.) The purchase money agreed on, and any other condition laid upon the purchaser, or the value which he proposes to pay.
- (5.) A list of the creditors, showing their names and surnames, the amounts due to them, the dates of their claims, and of their being entered (in the registry), and noted on the ship's register.
- (6.) The offer to place the agreed price, or declared value, on deposit [*depositare*], for division amongst the creditors.
- (7.) An address for service [*elezione del domicilio*] within the Commune in which the Court sits, which would be the proper one to sell the ship by auction [*incanto*], if that should be done.

A *précis* [*estratto sommario*] of this document must be inserted in the Journal that contains legal notices, in the place where the Maritime Office in which the vessel is registered is situated, and this *précis* is sufficient notice of such debts as are not bound to be specially published.

B. Bk. II. 2, 3, G. 471, 474, H. 316, 319, P. 1298, 1306, S. 599, 602, Sw. 278, E. 7, 91.

680. Every privileged creditor, or guarantor of privileged debts, can, within a fortnight of the aforesaid notification and advertisement, demand a sale by auction, on offering to raise the price by $\frac{1}{10}$, and to give security for the payment of the purchase money, and to satisfy every other claim.

This demand, signed by the claimant, or by a specially authorised agent [*procuratore speciale*], must be notified to the purchaser, with a summons before the Civil Tribunal of the place where the ship is registered, so that it may decide as to the admissibility of the security and on the demand for sale.

This provision is peculiar to the present Italian Code, the only thing analogous to it in other Codes being the right of a privileged creditor to have a sale of a ship at sea set aside on the ground of fraud.

681. If a sale is not demanded within the time and in the manner prescribed by the preceding Article, or if the demand is rejected, the purchase money remains definitely settled [*fissato*], and on depositing it the purchaser acquires the property in the ship, or share in the ship, clear of all privileges. The privileges are transferred to the proceeds, which are distributed, as in the case of a sale by the Court.

If the demand (for a re-sale) is allowed, the Court sanctions the sale by the same judgment, and it is then carried out according to the provisions of Bk. IV., Tit. I., Ch. II.

Taking this Article in conjunction with Art. 679 (6), *ante*, it would appear that a purchaser is not safe in paying over the money to the vendor, even if the application of a creditor under Art. 680, *ante*, fails. On such an application being made, he should pay the money into Court, or place it on deposit to abide the order of the Court, leaving the creditors and vendor to settle their claims amongst themselves.

682. The entry [*trascrizioni*] and noting [*annotazioni*] of privileges can only be cancelled by the consent of those interested, or by a judgment which cannot be resisted or appealed [*non più soggetta ad opposizione od appello*].

Anyone has a right to obtain a document shewing that there are one or more entries [*trascrizioni*] against a ship, or against a share in it, or a certificate that there are none.

End of Book II.

F. W. RAIKES.

V.—SIR TRAVERS TWISS ON THE LAW OF NATIONS IN TIME OF PEACE.*

IT had long been known to those interested in the subject that Sir Travers Twiss was preparing, in concert with Professor Rivier of Brussels, a new edition, the first in the French language, of his standard Treatise on the *Law of Nations in Time of Peace*, the last English edition of which was brought out by the Delegates of the University Press, Oxford, in 1883. We are grateful to our Belgian *confrère* for now placing us in possession of this new version.

The march of events is apt to be rapid in these days, and much had occurred since the publication of the last English edition of his work to make Sir Travers Twiss glad of an opportunity to draw the attention of Jurists to his views on some of the more salient features of these events, and that, too, in the traditional language of Diplomacy.

The Berlin Conference of 1884-5, on the affairs of the Congo State, with the Protocols resulting therefrom, had been within the immediate personal cognisance of Sir Travers, acting under instructions from the British Government of the day. This Conference, as Sir Travers justly remarks, in his Preface to the French edition, had opened a new era for the native races of the "Dark Continent," by placing them, in so far as they are independent States (*en tant qu'Etats indépendants*), in possession of the rights attaching to Juridical *personae*, no longer leaving them outside the Commonwealth of Nations. This very important Conference, therefore, naturally receives special

* *Le Droit des Gens ou des Nations, considérées comme Communautés Politiques Indépendantes. I. Des Droits et Devoirs des Nations en temps de Paix.* Par Sir TRAVERS TWISS, Docteur en Droit et Ancien Professeur de Droit Romain à l'Université d'Oxford, &c. Nouv. Ed. revue et augmentée. Paris. G. Pedone-Lauriel, Succ. 1887.

treatment in the French version, in which a new chapter is devoted to its consideration.

The application of the principles of the Congo Conference may perhaps receive fresh illustrations in other parts of Africa, as our knowledge of the interior grows, and as circumstances bring Europeans into contact with many a population hitherto unknown or but vaguely heard of. It may yet be applied in the further regions of the Soudan, or in that debateable land which lies between the hither Soudan and the Equator, by whatsoever name it may be called. The rescue of Emin Pasha, should it be happily effected by Mr. Stanley, may itself be a call to putting in force the principles of the Conference under or near the Equator. Nor does it seem out of place to remind English Jurists that the same principles may serve us in dealing with the complications which threaten at no distant date to perplex European Diplomacy in its relations with Morocco. Had the French edition of his work been but a little longer delayed, we should probably have enjoyed the benefit of some of the suggestions which must already have occurred to the mind of Sir Travers in connection with the questions looming upon us from the Sultanate which has the misfortune to touch at various points the Regency of Tunis, and the French colony of Algeria, and to be within measurable distance of the newly-annexed Spanish West African Territory,—Colony it can perhaps scarcely yet be called—while its northern shore faces the Rock of Gibraltar.

On the Eastern coast also, whether on the Red Sea shore, or beyond Cape Guardafui, there are not wanting elements of possible complications, in which the European Powers may do well to have recourse to the principles laid down at Berlin in the matter of the Congo Free State. The chapter detailing the history of the Congo Conference well deserved to be written, and could have been written by no more fitting pen than that of Sir Travers Twiss, himself the

principal author, if we mistake not, of the Constitution drawn up for the State at the request of the King of the Belgians. It is not given to all of us to draw up Constitutions, still less to see them in active operation. That the Congo State will be a source of Civilisation and of Law and Order among races till lately almost entirely unknown to Europeans, cannot admit of a doubt, if the provisions of the carefully drawn Constitution, and the equally carefully drawn Diplomatic recognition of the State, be faithfully adhered to in the future. In the example thus set, at any rate, both Europe and Africa will owe a considerable debt to the King of the Belgians for his unremitting zeal in the cause of Civilisation, and to the distinguished Jurist, *nulli secundus*, whose work is now before us, who wrought for the same cause alike under the King's instructions at Brussels, and under the instructions of our own Government at Berlin.

One point in the *Acte Général* of the Congo Conference seems worthy of special mention. By Art. 12, the Signatory Powers engage, in case of any serious difference arising between them with regard to, or within the limits of, the territories specified in Art. 1.,—viz., the zone of Free Commerce created by the *Acte*,—to have recourse, before appealing to arms, to the Mediation of one or more friendly Powers. In the same cases, there is reserved an optional right to have recourse to the procedure of Arbitration.

It will thus be seen that, by the Congo Conference, the prior place as a means of composing International differences is assigned to Mediation, and a secondary place only to Arbitration. The question which of these two is the better means for the attainment of the common end, Peace, is one which might well engage the attention of the Association for the Reform and Codification of the Law of Nations, at its forthcoming London Conference. The session of the International Peace and Arbitration Associa-

tion is to be occupied with a much wider question, and, moreover, that Society might deem itself estopped by its very title from the consideration of the relative value of Mediation and Arbitration. It would certainly seem, *primâ facie*, that the true position of these two modes of preventing War is that assigned to them by the Congo Conference. Two States which disagree, but are unwilling to plunge recklessly into War, may well invite the Mediation of a third party, or of several disinterested Powers.

If the result of this primary attempt at a peaceful solution is not satisfactory to both parties, recourse may well then be had to the Arbitration of yet another friendly Power. If this too fails, there remains only the *ultima ratio*, War. The advantages of Mediation seem to be various. The act of the mediating State or States is more distinctively friendly, and the counsel given has probably therefore a better chance of being followed. In Arbitration, the act of the Arbitrating Power is necessarily Judicial, and there is no Court of Appeal save that of the Field of Battle. For these and perhaps for other reasons which might well have weight as ancillary to those here given, it would seem that the latest attitude taken up by Sir Travers Twiss is in favour of Mediation rather than Arbitration, as a means for the solution of International differences short of the appeal to War.

It may have been observed by those who noted the language of M. Arthur Desjardins, in presenting a copy of the French edition of the work of Sir Travers Twiss to the Institute of France, at a recent sitting of the Academy, how much stress the learned and eloquent Advocate-General at the Court of Cassation laid upon the first chapter of the book, as containing the essence of the author's views, while setting in relief also the chapter devoted to the Congo Conference. M. Desjardins was herein clearly right. The initial chapter is one of first principles, and this it is which

gives that chapter its special importance. But there is another chapter of scarcely secondary importance in the eyes of the French Jurist, viz., Ch. VII., embracing the consideration of the Right of Self-Defence. This is, of course, a correlative to the Right of Existence and the Right of Independence.

In discussing the Right of Self-Defence, M. Desjardins touched upon some of the delicate questions connected with national armament which are so frequently disturbing elements in the European Concert. Every nation, as he justly observed (we quote from the *Belgian News*, of Brussels, for 16th April), is entitled to fortify its territories, to train up its population generally in the use of arms, to maintain a portion of its population under arms, to equip itself with stores and munitions of war. The presumption of Natural Law is that all measures of this kind are undertaken *bonâ fide* for the security of national independence. Within these limits no nation is bound to give account of its conduct to any other nation.

"It would, however, be otherwise," M. Desjardins continues, and here he comes to one of the most difficult points in modern International relations, "if a nation should increase its armaments to an extraordinary extent. The equal and corresponding rights of other nations might thereby be affected. All Jurists are agreed that, under such circumstances, another nation may, in pursuance of its own Right of Self-Defence, ask for an explanation, but it ought to do so solely on the ground of Self-Defence, in a courteous tone, and with an amicable spirit. It is here, it will be seen, that occasions for quarrel arise. A nation may profess great respect for principles, and yet practically set them at naught. A Government bent on war can easily aver that it is keeping strictly within the limits of Self-Defence, when in truth it is in search of a pretext for aggression."

M. Desjardins seems here to see very clearly into the difficulties of the present European situation. We are in presence of unquestionably enormous armaments, ostensibly for purposes of Self-Defence, but practically incompatible with any real feeling of settled Peace in Europe. Each nation, if asked, would no doubt aver that it was keeping strictly within the limits of Self-Defence, "but probably no other nation would believe in its heart that its neighbour of so peaceful a mind and so warlike an aspect was not in truth in search of a pretext for aggression." And we do not see how we could conscientiously say that the nations which so believed in their hearts would not be justified in so believing. The air of Europe is full of presages of storm. Men speak of Peace, but they make them ready for war. This state of things, according to M. Desjardins, has increasingly prevailed since the destruction of the olden European Equilibrium in 1859. Ever since then, the maintenance of Right bristles with difficulties. The question of the Independence of Nations is also one which presents increasing difficulties in the present day.

Hobbes (*De Cive*) holds that "No Community is entitled to be regarded as a nation unless it be adequate to maintain its independence against all external assault by its own intrinsic strength." This, however, is rightly rejected by Sir Travers Twiss (Ch. I., § 11) as too absolute a statement, and for him it suffices that the State be not *de jure* dependent upon another for its freedom of political action. Some questions may arise, under modern combinations, as to what amount of "freedom of political action" constitutes the requisite here laid down. And it would seem from other passages of his first Chapter that Sir Travers narrows down his conception of membership of the family of Nations within limits which we are ourselves unable to accept. If we rightly apprehend the language of Sir

Travers, he would deny the character of member of the family of Nations alike to the Kingdom of Bavaria and to the State of Rhode Island, save and except as the one is a member of the German Empire and the other of the Federation known as the United States of America. But all the essential elements of Sovereignty exist alike in the Kingdom of Bavaria and in the State of Rhode Island. If the German Empire were to be broken up to-morrow and the Federal Union dissolved, the Kingdom of Bavaria and the State of Rhode Island would at once, in our view, be full members of the Family of Nations, resuming all such portion of their respective Sovereignities as they might have temporarily delegated to the German Empire and to the Federal Union. An individual Bavarian and an individual Citizen of Rhode Island appears to us to be a member of the Family of Nations as the subject or citizen of a Sovereign State, though that State may have delegated some portion of its Sovereignty to an Empire or a Union. The fact that the King of Bavaria has accepted the German Emperor, or rather the Emperor in Germany, as his Over-Lord—to use that language of Feudal Law which alone is applicable to the relations between the two Monarchs,—does not make the King of Bavaria any the less a King within his own dominions than the Norman and Angevin Kings of England were for the fact of owning the French King as their Over-Lord for Normandy or Guienne. Moreover, the doctrine which would deny to Bavaria or to Rhode Island the character of member of the Family of Nations appears to us fraught with danger. For, under that doctrine, such an event as the break-up of the German Empire or the dissolution of the Federal Union would involve a condition of Anarchy, the setting-up, in fact, of the Great Nothing, the dream of the Nihilist. Under our doctrine no such results would ensue. Bavaria and Rhode Island would simply

resume the full enjoyment of the Sovereignty inherent in each, and which each formerly (and that not long ago) possessed in such fulness. At the present moment, therefore, to our eyes, a Bavarian or a Rhode Islander has a twofold *persona*, that of Bavarian and that of German—that of Citizen of Rhode Island and that of Citizen of the United States. Any other theory seems to us to be fraught with possibilities of danger, besides being in itself less true to our understanding of Sovereignty.

Such a view as we have ourselves suggested seems in conformity with the language held by an American Jurist whose work on International Law has only been posthumously published, that of the late Professor Pomeroy.* It is there pointed out (*op. cit.* p. 47) in a citation from the American Professor's parallel work on Constitutional Law, to which we hope shortly to devote some space, that a "*municipium, civitas, or State, in its strict sense is an independent political society with its own organisation and Government, possessing in itself inherent and absolute powers of legislation. It may not, from some peculiar features of its voluntarily created or permitted form of Civil order, have enabled its rulers to call into efficient action all of these inherent and absolute powers of legislation, and it may have restrained itself, by solemn and fundamental enactments, from exercising these complete powers, except by a course and in a manner distinctly defined and established; yet, so far forth as it professes these attributes without limit, and so far forth as it has clothed its constituted rulers with functions that involve these attributes under limits, it knows no superior to itself, it is not subordinate to any other political society or Government.*"

* *Lectures on International Law in Time of Peace.* By JOHN NORTON POMEROY, LL.D. Edited by THEODORE SALISBURY WOOLSEY, Professor of International Law, Yale College. London. Stevens & Haynes. Boston. Houghton, Mifflin & Co. 1886.

So far forth, therefore, as Rhode Island and Bavaria possess the above attributes, and have clothed their rulers with functions that involve them, our argument is that they are respectively members of the Family of Nations, and that consequently their subjects or citizens are in their individual capacity themselves members of that Family, independently of their other qualification for such membership through German or American citizenship.

Sir Travers Twiss says formally (Ch. I., § 2) that the States which in 1871 united to form a Confederation under the name of the German Empire have ceased to be members of the Family of European Nations, and are simply members of the German Empire. Nevertheless, he notes the fact that "the Constitution of the German Empire has left to those States the Right of Diplomatic Representation" (Ch. I., § 2, *note* 1). It appears to us that our thesis involves fewer difficulties, for the Right of Diplomatic Representation is surely one of the Rights of Sovereignty. Its exercise, *e.g.*, by the Pope shews that the Pope is not a subject of the King of Italy, but that under the Law of Papal Guarantees he is treated as representing the Sovereignty so long exercised by his predecessors. If we have seemed to insist at some length upon this point, it is because we agree with M. Desjardins in considering that the first chapter of the work before us contains the essence of the views of Sir Travers Twiss on the subject of his Treatise, and because we also agree with M. Desjardins in considering that, looking back upon his labour of years as a leader among International Jurists, we may say of the new edition of his *Law of Nations in Time of Peace*, that Sir Travers Twiss has advanced new arguments in support of the principle of the Independence of Nations, and has thereby served the cause of Civilisation and merited the plaudits of Humanity.

Quarterly Notes.

The Coming London Conference of the Association for the Reform and Codification of the Law of Nations.

In the Jubilee Year of our Queen, it was a very natural thought of the Executive Council that to hold the Conference for 1887 in the City of London would be a fitting commemoration of so rare an occasion.

Two English Kings before George III., viz., Henry III. and Edward III., both exceeded the period of fifty years in their tenure of the kingly office. The present Queen is, therefore, the fourth sovereign who has ruled over England who has been entitled to a Jubilee. Curiously enough, it is also a Jubilee year for the Pope, though not as regards his Pontificate. *Sancte Pater, non videbis annos Petri*, used to be said to each successor of St. Peter on his enthronement, but Pius IX. falsified that warning, and we know not whether this piece of Papal ritual will long survive the shock. Custom may keep it alive for a Pontificate or two.

In the deliberations of the London Conference of 1887, the Association will be at no loss to find subjects. That these will be in the main eminently practical, the character as a Jurist of the Chairman of the Executive Council, Sir Travers Twiss, would alone be sufficient guarantee. There is the further guarantee of the support of the Lord Mayor and Corporation, which is, we believe, assured to the Conference, whose sessions will, it is hoped, once again be held in the Guildhall of the City of London. We understand that numerous promises of presence and co-operation have already been received by the Council from Chambers of Commerce, both at home and abroad, as well as from the American Bar Association, and other bodies in the United States, and from distinguished Jurists in France, Italy,

Belgium, Germany and other parts of the Continent. It is proposed to hold the Conference during the last week of July, which will give members of the English Bar an excellent opportunity of meeting their Continental brethren.

* * *

The Colonial Conference, and the Execution of Judgments.

We have noticed, on at least three occasions, in the daily diary of the proceedings of the Colonial Conference which has been published in the newspapers, that the subject of the Execution of Colonial Judgments has been discussed. These daily notices have been very brief, but from the language used we are entitled to assume that the question has taken a practical shape, and that means have been found to render possible the execution of Colonial Judgments in England, and, *vice versa*, of English Judgments in the Colonies, without the necessity of bringing actions upon them. By what process this desirable object will be attained we are not as yet in a position to inform our readers, but presumably it will be assimilated, as far as it is practicable, to the process of registration introduced by the Judgments Extension Act, 1868, with regard to judgments of the three parts of the United Kingdom. So long ago as November, 1880, in an article in this *Review* on Foreign Judgments, Mr. F. T. Piggott pointed out that, sooner or later, Colonial Judgments would have to be treated in a similar way. We are glad to see that Mr. Piggott has been present at the deliberations of the Conference whenever the question has been before it; in fact, we believe it to be an open secret that it is mainly owing to his earnest advocacy of the cause that the question has been brought before the Conference. We look forward with interest to the publication of the details of the scheme; if it can be made to include orders in Bankruptcy and in the winding-up of Companies, so much the better.

* * *

On various other points besides that of the execution of Judgments, the Colonial Conference seems to have been alike practical and successful. This is matter for sincere congratulation to those who were responsible for summoning to the Mother Country representatives of so many and such widely-divergent daughters. There were not wanting doubts in the minds of many as to the wisdom of the course. But as far as we can at present see, these doubts have all been set at rest, and have vanished, and that right speedily, before the actual published facts of the Conference. There can be no doubt that not a few points of considerable delicacy involving the relations of the Mother Country with other European States, necessarily came up for discussion. It is not possible that South Africa, Australia, Canada, to name no more, should have spoken their several minds without bringing up questions in which Germany, Portugal, France, and the United States must have been more or less also in the minds of the Delegates as well as the Home Authorities.

The interests of Commerce, the Postal and Telegraphic relations of our country with the Colonies, and of the various Colonies *inter se*, the means of Colonial defence by sea and land :—these, and other important subjects have at different times all been brought before the Conference, and their discussion, we believe, has throughout been conducted harmoniously, in the best interests alike of the Mother Country and of the Colonies.

The general result of the whole, we anticipate, will be a strengthening of the feeling of that unity which is bred by sympathy, and which is well expressed in the Cornish motto, "One and all."

* * *

The New Zealand Law Reports.

We have received, with great satisfaction, the first volume of the *New Zealand Law Reports* (Wellington, N.Z.: Edwards and Green. London: Stevens & Haynes), which are got up

in the style and manner of the English *Law Reports*. Their publication is a sign of the ever-increasing activity of our Colonial Empire, which has been so much *en évidence* among us during this year of Jubilee. In another part of our *Quarterly Notes* in the present number, we have glanced at the important work done by the Colonial Conference, in accepting the scheme for allowing speedy execution to Colonial Judgments in England, and *vice versa*. The judgments reported in the volume before us well repay a careful perusal, and will shew, we think, that the confidence which Parliament will shortly be asked to repose in Colonial Judges is not likely to be misplaced. The Reports are published under the direction of the New Zealand Council of Law Reporting.

* * *

Australian Law.

Mr. John Dennistoun Wood, formerly Attorney-General for Victoria, has likewise done good service in the direction of increasing our knowledge of the Colonies, by publishing a useful and very handy volume on *The Laws of the Australian Colonies as to the Administration and Distribution of the Estate of Deceased Persons*. (London: Stevens and Sons. Melbourne and Sydney: C. F. Maxwell.) The importance of a knowledge of the laws of our Colonies on such a subject cannot be over-estimated. We hope that in his next edition Mr. Dennistoun Wood will include the laws of all the Colonies on this branch of Colonial Law.

* * *

In connection with the much to be desired increase of our knowledge of other systems of Law than our own, we would mention a very valuable feature which distinguishes Mr. Emden's *Annual Digest* (Clowes and Sons)—the fourth volume of which is now before us—from other works of a similar nature. Although he does not profess to give us an United

Kingdom Digest, very many important decisions of the Irish, Scotch, and American Courts are incorporated. The more our knowledge of the laws of other countries grows the less insular will our notions become, and the broader our views of policy, as well as of Law.

Reviews.

A History of Private Bill Legislation. By FREDERICK CLIFFORD, Barrister-at-Law. 2 Vols. Butterworths. 1885—1887.

This is, as regards the latter portion, at least, the first "Jubilee" Legal Treatise which we have seen, and it therefore stands out, from that point of view, in a marked manner, though the book itself is one which needed and needs no such extraneous helps to notice. *Per se*, we do not know that a "Jubilee" law book would appeal to us more than one published out of Jubilee time. With Mr. Clifford's book, however, we were already acquainted, through the first volume, and had been enabled thereby to judge somewhat of the value to be attached to it. The subject which the learned author has taken in hand is one affecting a wide and varied field of interests. It is impossible to cast one's eyes over the contents of any part of these two goodly volumes without being struck by the width and variety of the interests involved. Private Bill Legislation may sometimes, no doubt, cover a little in the way of what might be called "private crotchet" legislation; but, taken as a whole, it is bound up with some of the best and highest interests of the nation, and deserved therefore to have so careful and learned an exponent and historian as Mr. Clifford. The subject, indeed, is one requiring the historical treatment, for it is closely connected with the history of the growth of Parliament, and of Parliamentary law and practice.

As samples of the wide area of interests covered by the book, we may point to such headings as the following, taken simply as they come before our notice in glancing through the volumes. In Vol. I. we may point to Canals, Railways, and Tramways, among the modes of Commerce and of locomotion affected—to

Inclosure Acts, as affecting rights in Commons—to the Cloth Manufactures of Kent and the Ironworks of Sussex, among home industries—the several Gas and Electric Lighting Acts, among inventions marking the growth of modern improvements upon the system of our forefathers—and, perhaps not the least striking of all, as representing the possible Marine Sub-way of the Future, the Channel Tunnel Bills of 1883-4. And these, it must be remembered, are mere samples, given *currente calamo*. Similarly in Vol II. we note three chapters devoted to the very important special subject of the Water Supply of London, and three to the equally important general questions of Local Authorities. Here we are carried back to the times of William the Conqueror, and his greeting to the Port Reeve of London, and to Domesday Book, if possible, more famous than before since its Octo-Centenary Commemoration. In the second volume too, we find, besides a chapter on Marine, Fire, and Life Insurance, full accounts of the Procedure in Private Bills, before the two Houses and at Bar, as well as an appropriate discussion of the present position and future prospects of the subject to which Mr. Clifford has devoted so much of his time and thought. We are far now from the days of William the King and Gosfrith the Port Reeve; far also from the days of the *fontes precipue* of FitzStephen, the biographer of St. Thomas of Canterbury, who tells us of the *fons sacer* and the *fons clericorum*, the Holy Well and the Clerken Well, now overlaid by such mazes of building. But as late as the present Queen's Accession, Mr. Clifford has to record that Receivers and Triers of Petitions were appointed for “Petitions de Gascoigne et des autres terres et pays de par la mer et des isles,” words, as our author well remarks, of a significance which the ancient Receivers and Triers would have regarded with incredulity. But they are words full of meaning to the Delegates who have been summoned from many a land beyond sea, of which none, save perhaps the Celtic Bishop traditionally stated to have suffered for his belief in the Antipodes, could have had any glimmering of a perception in the Middle Ages.

It will be seen that Mr. Clifford's book is full of interest for the Historian, and for the student of our Parliamentary Constitution as a branch of general Constitutional History. What the Future has in store for us, Constitutionally speaking, it would just now be rash to prophesy. We fear that the times are not so favourable to the growth of sound doctrine and

practice as to that of persistent obstruction, met by sharp and even somewhat despotic remedies. We are all the more glad to have amongst us sober writers such as Mr. Clifford, who trace back for us our links with the Past, and urge upon us a sound and moderate progress in the Future.

The Punishment of Death. To which is appended his treatise on Public Responsibility and Vote by Ballot. By the late HENRY ROMILLY, M.A. John Murray. 1886.

The Punishment of Death and Vote by Ballot are subjects the union of which in the field of literary discussion appears so incongruous, that the fact of their being brought together in one and the same volume might at first sight be thought ironical. It was also difficult to apprehend what particular object was likely to be served in reprinting an Essay upon a topic which, though full of interest in 1876,—the date of its first appearance—has now long since passed beyond the region of political controversy. Upon consideration, however, it would seem probable that the reason for the republication of the one, and its juxtaposition to the other, was founded upon a desire to collect the literary remains of one who was not only descended from a great English law-reformer, but who also himself had inherited in some degree many of those sterling qualities of heart and head which helped so truly to distinguish his illustrious father. It is not to be denied that profound reverence for the tenets of the Christian Creed, and a conscientious solicitude for the sanctity of human life are the prevailing sentiments which characterise the fifteen Essays, or, as their author modestly preferred to call them, "Letters," upon that gruesome question, the Punishment of Death. It must also be conceded that the style in which they are composed is always refined, and in places forcible and eloquent. But when we come to examine the materials which form the 204 pages, little, if anything, can be discovered which has not already been as cogently dealt with in the work by the late Macrae Moir, based upon Mittermaier, and in the evidence given before the Capital Punishment Commission of 1864.

The two main propositions advanced by the late Mr. Henry Romilly in favour of the abolition of Capital Punishment are, "that you cannot take away the life of a criminal without in a measure depriving him of opportunities of making good his

claim to mercy at the hands of another and a higher tribunal ;” and that, in retaining the death penalty, Society “ follows up the perpetration of a first deliberate homicide by the perpetration of a second.” Unfortunately for the abolitionists’ cause, these arguments are no new-fangled weapons with which to assail the supporters of the *status quo*, nor are they likely to prove more effective than those which have been hitherto employed. As regards the latter proposition, we are under the impression that we have seen it attributed to Voltaire, but both are probably as ancient as the controversy which engendered them ; and, strange as to some it may seem, the older they grow the less they appear to gain in public estimation. It is true, indeed, that no Parliamentary Session could be considered complete unless this topic—just as that of Compulsory Sobriety, and such like crotchets—were trotted out in that superior debating club, the British House of Commons, when all the antiquated platitudes are furbished up anew, and the beneficent results flowing from the inauguration of this reform in, say, a Swiss Canton, or some other equally remote and sparsely-populated district, are triumphantly paraded. Happily for one’s peace of mind, a few columns of frothy oratory reported in the *Times*, and a leading article there and elsewhere, suffice to place the subject quietly again on the shelf for the next twelve months.

For those about to embark in academic symposia of this kind, the volume under review will afford excellent preparation ; for it contains the earnest reflections of a large-minded and highly-cultivated humanitarian,—one who has duly taken note of, and calmly weighed, the views of his adversaries, though he may not have successfully grappled with them. But, as Mr. Romilly candidly admits, as long as judges, advocates, governors of prisons, gaol chaplains, and, indeed, all persons whose duties bring them into personal contact with criminals, continue to testify to the fact that there is no punishment comparable to that of death in the terror which it inspires, the difficulties in the way of bringing about our desired conversion will probably remain insuperable.

The Influence of the Roman Law on the Law of England. Being the Yorke Prize Essay of the University of Cambridge for the Year 1884.
By THOMAS EDWARD SCRUTTON, M.A. (Lond.), B.A. (Camb.), LL.B. (Lond. and Camb.), Barrister-at-law, Professor of

Constitutional Law and History, University College, London. Cambridge: University Press. 1885.

Professor Scrutton makes a sort of apology, on the plea of youth, for the little book under review, being, he tells us, a young man, within seven years of his first degree. But we have always heard that Jack the Giant Killer was young when his greatest exploits were performed; and Mr. Scrutton, following so great an example, attacks one giant after another, with all Jack's boldness and something of Jack's success. He assails the giant Finlason, the giant Coote, and the giant Seebohm in their strongholds, sapping their ill-constructed foundations, and bringing the superincumbent edifices about their ears. Mr. Finlason relies on the *Mirror of Justice* as an Anglo-Saxon authority, on the ground that the expressions "Turgis saith," "Billing saith," shew that it must have been written in the time of Turgis and Billing, who must have been Saxon judges. A similar argument, Mr. Scrutton pertinently observes, might be adduced to shew that every book containing the words "Lord Eldon lays down," was written in Lord Eldon's lifetime. Again, Mr. Scrutton exposes the weakness of the argument that the Saxon law must have descended from the Romans because the Saxons were rude and rough, and could not have made it for themselves. Mr. Coote relies a good deal on the resemblance of the *trinoda necessitas*, or liability for bridges, town fortifications, and some other things, to the Roman provincial burdens of *pontium refectio*, *arcium munitio*, &c., an analogy of more weight, we think, than Mr. Scrutton seems disposed to admit; but other arguments used by Coote are thoroughly fallacious, and the single coincidence just mentioned is insufficient to warrant his conclusions. Mr. Seebohm's principal argument, founded on a supposed derivation of the English agricultural system from parts of South Germany where Roman influence prevailed, is too largely based on hypothetical matter to be seriously entertained in a Law treatise. Mr. Scrutton's conclusion, from these and other indications, is that those who would place Roman influence high during our Anglo-Saxon period have no solid ground for such a contention.

We cannot follow the author minutely through the subsequent periods; but we may state, as representing his general views, that the influence of the Roman system was very slight before Vacarius brought Roman law from Bologna to Oxford; but that it made substantial progress after that time, partly through

clerical influence and partly through Bracton, whom Mr. Scrutton considers to have based on the Civil Law certain portions of his celebrated treatise exceeding the three pages grudgingly admitted by Mr. Reeves, though not amounting to the third part contended for by Sir H. S. Maine. Subsequently it became less popular; and in Coke's time it had little, if any, effect on the "Common" or general law, though in certain special branches it had come to be tacitly recognised. Its position in modern times was well summed up, in Professor Scrutton's opinion, by Tindal, C.J., who said, in effect, that our Judges are not bound by Roman Law, but may refer to it, if they like, where there is no English decision to guide them (*Acton v. Blundell*, 12 M. & W. 324, 353).

In striving to arrive at a just estimate of the force of Roman Law at different periods, Mr. Scrutton has shewn considerable industry. We agree with him; in general, in his strictures on some of the previous workers in the same field, and we are bound to give him credit for a blunt pugnacity in the demolition of unfounded theories, which may be more admired by some than the current practice of allowing them a factitious *locus standi* as "views." He is over-bold, however, when he twits the great Coke with want of accuracy, giving, as an instance, the statement that "in prohibiting the lineal ascent in inheritance, the common law is assisted with the law of the XII Tables." He is anticipated in his views on this point by Coke's annotators (*v. Co. Litt.*, Hargrave and Butler's Edition [11 a.], *Note 2.*), but he and they have failed to observe that the law of the XII Tables, by placing the agnates next to the *suus haeres*, or actual descendant (*Si intestato moritur, cui suus haeres nec sit, agnatus proximus familiam habeto*; XII Tab., V., l. iv.), excluded ascendants altogether, because there were no ascendants among the agnates at that time. If any one should doubt the correctness of this statement, we may refer him to Gaius, who, after defining agnates, and giving three examples—viz., (1) whole brothers and half-brothers by the father, (2) father's brothers, and (3) brothers' children—goes on to say that on the same principle we can arrive at further steps (*plures gradus*) of agnation (*Gaius, Comm. III.*, 9). The corresponding portion of Justinian's Institutes is in almost precisely the same words (*Just., Inst. III.*, ii., 1). Such language seems sufficient in itself to prove our case, as shewing that the other "steps" are more remote, and cannot, therefore,

include the father. But from later parts of the Institutes, we get much more than this. After giving a careful description of agnates, which does not include any ascendants, Justinian tells us that, notwithstanding that description, even ascendants, if they emancipate their children, *contractâ fiduciâ*, are called to the statutory succession, and that, by his own Constitution, all emancipations are now deemed to be *contractâ fiduciâ* (Just., *Inst.* III., ii., 8). [For the succession of ascendants, cf. Rivier, *Successions à cause de Mort en Droit Romain*, Brussels, 1878, pp. 166—9, where the relative text of Nov. CXVIII. is printed.—ED.] And in a later paragraph, the statutory successors of his own time are defined as including, in addition to the (original) agnates, those persons who have been raised to the position of agnates either by certain *senatus consulta*, or by Justinian's own Constitution (Just., *Inst.* III., v. *prel.*). It is clear, then, that ascendants only attained the position of agnates by Justinian's Constitution, and that they could not possibly have been included in the term "agnates," as used in the XII Tables.

We are duly grateful for the opportunity which has thus been afforded to us of rescuing the memory of a great man from an imputation of carelessness; but the vindication of Coke could not be effected in half-a-dozen words, and we have the less room left for the consideration of Mr. Scrutton's own character for accuracy. Keenly as he enjoys exposing the hasty statements and conclusions of others, he certainly cannot be considered immaculate himself. He refers pretty frequently to essays and treatises which have no prestige of age or general approval as if they were works of conclusive authorities. He takes it as "admitted" that the Anglo-Saxon testamentary power was due to clerical, and therefore to Roman, influence. We cannot discuss this double-barrelled proposition here, but we should have liked to see a better reason for it than the statement that only four Saxon wills anterior to A.D. 950 are now in existence. He tells us, on the authority of a vague reference to Spence, that our English Court of Chancery is "Roman to the back-bone;" he assumes, without adducing any authority whatever, that "the free village community is an essentially Teutonic institution;" he alleges in one place that "Glanvil is comparatively free from any Roman influence," in another that "the Ecclesiastical Courts rule themselves by the Roman law, and from their proceedings Roman influences affect the book of Glanvil." He

is not justified in stating, generally, that dower of Copyhold extends to half the estate, and dower of Borough English to the whole. It is well known that the extent of dower of Copyhold depends entirely on the custom of the manor (Cf. 2 Watk. on Cop., Coventry's Edition, 69). In one remarkable case (that of the Manor of Whitchurch) it extends to the whole, one-half, or one-third, according to certain defined conditions. As regards Borough English, Mr. Scrutton's mistake has been made and corrected before—made by Mr. Roper (Cf. 1 Rop. H. & W. 351, referring to 2 Bl. Com. 82), who refers to a passage in Blackstone, corrected by Mr. Robinson, in his work on Gavelkind (Cf. Rob. on Gav. 391, *note*). The passage in Blackstone merely signifies, in our opinion, that dower of the whole is an incident which *may* exist in "burgage tenure;" but even if it means more than this, it is of no avail to Mr. Scrutton, for its acknowledged and sole authority is a section of Littleton (viz., Litt. 166; cf. also Coke's observations on this section, Co. Litt. [110 b], [111 a]) which deals merely with the custom of "*some boroughs*," and makes no mention whatever of Borough English. A useful feature of Mr. Scrutton's book is the "List of Works Cited" at the beginning; but the foot-notes occasionally perplex the reader by referring only to the name of the author, although several works by the same author appear in the "List." It would have been as well if Mr. Scrutton had avoided alluding to the Rolls edition of Bracton, which, he gives us to understand, has been handled somewhat severely by him in the pages of one of our contemporaries. It is the duty of a reviewer, no doubt, to express freely his opinion respecting any book that comes before him; but it is not within his legitimate province to perpetuate adverse criticisms by reiterating them in his own subsequently published works. Such persistency, moreover, in adverse criticism of the work of a former Regius Professor of the Civil Law in the University of Oxford, does not, as a matter of inter-academic courtesy, read well as part of a Prize Essay adjudged by a sister University, and from the pen of one pleading youth as his *apologia* for his own possible shortcomings.

The Principles of Bankruptcy. By RICHARD RINGWOOD, M.A., of the Middle Temple, Barrister-at-Law. Fourth Edition. Stevens and Haynes. 1887.

It has been suggested in some quarters that Mr. Ringwood's

book is not sufficiently comprehensive for the Solicitors' Final Examination as it now exists, and for which, amongst other Examinations, the author states that it is intended. We take a different view of the work before us; it would not, indeed, be sufficient to furnish an answer to every question, but we find, on glancing through the recent Examination papers, that in nearly every case sufficient matter to pass a student could be gathered from the materials which Mr. Ringwood provides. Besides, as we shall notice in speaking of Mr. Harrison's *Probate and Divorce Manual*, students under examination at the Solicitors' Final have now so many subjects, that those merely desirous of a Pass would neither have the time nor inclination to labour through Mr. Baldwin's work—exhaustive as it has now become—especially as there is only half a paper devoted to Bankruptcy, which is taken together with the Law and Procedure of the Queen's Bench Division.

Those Pass-men only are now supposed to go in for the optional subjects, who have made them a special study owing to their intending to practise in that branch of their profession, or for some other reason. But, from next year, every student will be obliged to take them up. Therefore, we say of Mr. Ringwood's work, as we also say of Mr. Harrison's, that it will be just the book for Candidates desiring a Pass certificate only; for candidates desiring honours, neither Mr. Ringwood's nor Mr. Harrison's work will be sufficient.

We think it is an excellent plan to put headings in Clarendon type, as it draws the student's attention to each separate heading. Thus we note, "First and other meetings of creditors," p. 46; also, "Composition or scheme of arrangement," p. 47; but there is not very much of this type used, and we think a little more would be an improvement. The object of manuals for the student is to simplify the law. Students, as a rule, will be most apt to read the book which saves them most trouble, and there is no method of simplification more efficacious than a variety of type, and, of the five common varieties, about the best to attract the eye is the Clarendon.

Mr. Ringwood tells us that his work is intended not only for the future Solicitor, but also for candidates for the Institute of Chartered Accountants. We do not profess to know much of their examination, but, speaking on broad and general grounds, an admirably arranged first treatise, like the one now before us, cannot but be most suitable. The Table of Cases, we

are glad to see, comprises references to all the Reports, for which, no doubt, such a publication as our *Quarterly Digest of all Reported Cases* is found a material help. This feature of Mr. Ringwood's volume is most serviceable, and will add to the value of the work as a whole. The Appendix embraces the Bankruptcy Rules for 1886, the Bills of Sales Acts, and other matter.

In conclusion, we would suggest in the case of works like those of Mr. Ringwood and Mr. Harrison, the addition in their next issues of a Table of the Abbreviations used. This is a really necessary *addendum* to every work intended for students.

An Epitome of the Laws of Probate and Divorce. By J. CARTER HARRISON, Solicitor. Third Edition. Stevens and Haynes. 1886.

That this little book has succeeded is witnessed by the fact that it has reached a third edition in seven years. The first edition, which appeared in 1880, consisted of 153 pages. The present edition contains 228 pages. Therefore it has not, as is now too frequently the custom in legal treatises, been enlarged with such rapidity as to convert it from an analysis into an ordinary-sized work, but yet it has grown in bulk as fairly as new decisions and statute law justify. There is yet another reason to warrant a certain amount of enlargement. The subjects of Probate and Divorce in the Solicitors' Final Examination, for which the book is chiefly written, have been hitherto voluntary, and there were usually only two or three questions set in each of them. Next year they will be made compulsory subjects. Now, seeing that the Solicitors' Final Examination embraces nearly every important head of the Law, and, in some subjects, like Conveyancing, assumes a somewhat searching character, it is too much to expect a student to get up a large work on an outlying subject like Probate and Divorce. Besides, unless a change should be made, the questions on Probate and Divorce must be answered in the same three hours as those on Criminal Law, and Proceedings before Justices of the Peace, Admiralty and Ecclesiastical Law:—whereas three hours are given separately to answer each of the Papers on the more important subjects, such as Conveyancing, so that the questions will be few, and probably simple ones. Therefore, it appears to us that a book,

about the present size of Mr. Carter Harrison's, is precisely what will be required in those subjects, and till now it has been the only small work on Probate and Divorce.

As regards the substance of Mr. Carter Harrison's work, it is clearly and simply written; 108 pages are devoted to Probate, 70 pages to Divorce law, and 20 pages to Divorce practice. We do not see that any matter has been omitted which ought to be inserted in a first work; but one point we would submit to Mr. Harrison's consideration in view of his next edition. In order to give the Court Jurisdiction in Matrimonial Causes, there are four elements to be considered; the Allegiance, the Domicil, the Place of Marriage, and the Place of Delict of the parties. Now we have never, in any work on this subject, seen the law on this point concisely stated so as to make it in our opinion clear to a beginner, how many and which of these requisites must be British in order to give the Court Jurisdiction; the books usually state decisions, frequently conflicting on this head, but they do not summarise any conclusion from them, so as to point it out to the student. If Mr. Carter Harrison will set an example as to this in his next edition, his little work will be perfect for the purpose which it is intended to fulfil.

The Student's Guide to Bankruptcy. By JOHN INDERMAUR, Solicitor. Second Edition. Stevens and Haynes. 1887.

We do not altogether approve of books of questions and answers. We think that by using them students are too apt to get into the habit of cramming, and learning matter purely by rote instead of acquiring legal principles scientifically. We also think that the interposition of questions tends to confuse and throw out anyone trying to read his subject straight on. This would not be so if, in a question and answer book, a perpendicular line were drawn through each page, and the questions were put on one side and the answers on the other, a plan which, to our mind, would be a vast improvement on the existing system, but which we do not remember ever having seen adopted, probably because it would add considerably to the expense of the work.

Subject, however, to the general objection just stated, we are able to speak well of Mr. Indermaur's *Guide*. The questions seem well selected and to the point, and the answers are about the length which would be required in an Examination—no

unimportant item, because students frequently do not know to what length their answers should run, and often devote too much time to some questions at the expense of others. The various heads of Bankruptcy are dealt with in appropriate order; and the answers purport to be taken from the latest editions of Mr. Baldwin's and Mr. Ringwood's works on *Bankruptcy*, and, as far as we have been able to test the references, they have proved to be accurate.

An Analysis of Snell's Principles of Equity, with Notes thereon. By E. E. BLYTH, LL.D., B.A. (Lond.), Solicitor. Second Edition. Stevens and Haynes. 1887.

We presume that a book of this kind which has reached a second edition in two years must be rather widely used. This may be partly owing to its purporting to be an analysis of the well-known *Snell*. Most students read *Snell*, but as it looks large and formidable, perhaps they think the attack on the principal work had best be made with the aid of the analysis to it. But would it not be better were students to compile an analysis for themselves as they proceed in their course? *Snell* is very easy reading, and a charming book to analyse, as there is a good deal of matter in it which runs to an unnecessary length, and some which had better have been left out altogether. Now nothing serves to impress what he has read on a man's mind more than to make an analysis for himself; he thus also gains practice in the analysis necessary for answering Examination questions. A ready-made analysis by one's side is too apt to act as a deterrent to framing one for oneself, and also induces the student to trust to the analysis to the neglect of the larger work, and hence to get up the subject imperfectly.

A book purporting to be an analysis of any subject of law based on independent lines is most useful; and in works of this description, Legal literature has, until the last few years, been somewhat lacking; but a professed analysis of a particular work, and that a work not in itself difficult, can answer, according to our judgment, no very good purpose.

As to the *Analysis* itself, we think the style too laboured; hence the reading is not easy. There are also some slight inaccuracies. For instance, *Reynolds v. Godlee* is cited on p. 44 as if it read concurrently with *Curteis v. Wormald*, instead of being overruled by it, as we gather from the *Law Reports*.

We doubt the statement on p. 26, to the effect that there is an escheat *to the Crown* in all cases under the Intestates' Estates Act, 1884. The Act says nothing about the Crown ; why should not the escheat lie to the lord of the manor ?

The best use to which Mr. Blyth's book could be put would be to read it after *Snell* has been perused, and shortly before going up for examination.

Questions on Equity for Students preparing for Examination, founded on the Eighth Edition of *Snell's Principles of Equity*. By W. T. WAITE, Barrister-at-Law. Third Edition. Stevens and Haynes. 1887.

We have said that we do not care for books of questions and answers ; this remark does not apply to books of questions only. We think these are useful—no answers at all, but merely references, being given ; because such books enable the student to test his knowledge and apply what he has read. But the questions before us are far too simple. It would almost appear as though, in a good many cases, the author had taken the marginal notes of *Snell*, and put them into an interrogative form. For example, on p. 3, we find, "Explain Executed and Executory Trusts," "Define a Trust," "Distinguish between Voluntary Trusts and Trusts for Value. Give one instance of each." Surely the author must be aware that Examination questions now-a-days are much more craftily framed than that, and require thought and consideration before they can be answered. Witness, for instance, the Equity portion of last April's Pass Examination for Solicitors ; out of fifteen questions only four were so framed that they could have been answered straight from a text-book. All the rest required, as it is reasonable that they should require, the practical application of knowledge derived from reading.

A Short Epitome of the Principal Statutes Relating to Conveyancing. Fourth Edition. By GEORGE NICHOLS MARCY, Barrister-at-Law. Stevens and Haynes. 1885.

Somewhere, perhaps not far, on the student's road through the mazes of the Conveyancing Statutes, may this book be placed. It is, like its predecessors from the same hand, an attempt to express in telegraphic English all that remains of

the land legislation of (now) just six hundred years. We believe that the earlier editions have been valued by despairing students on the eve of their examination: they should then lay the book aside until they have only need of a reference to the epitomised Statutes. Short cuts are proverbially dangerous; they are not less so when styled Epitomes. The book is honestly what it professes to be; but we fear it will have undue responsibility thrust upon it by the growing class who read their Reports by the head notes, and their Acts of Parliament always by the notes in the margin.

Principles of the Common Law. By JOHN INDERMAUR, Solicitor. Fourth Edition. Stevens and Haynes. 1885.

We are glad to note the fact that this pleasant and easily-written work has reached its fourth edition. The art in writing books for the student is to bring out the points of importance in a simple and striking way, with no surplusage and useless verbiage; and in this respect Mr. Indermaur has been conspicuously successful. His *Principles of the Common Law* will compare very favourably with some other works upon the same subject.

The author has prominently brought out nearly all the points which are frequently touched on in examinations, and we find very little matter inserted which could well be omitted, or omitted which required to be inserted. In view of a future edition, however, we would suggest one or two improvements. Considering the size of the book, there is too much space devoted to "Landlord and Tenant." This head, properly speaking, is a subject in itself, and only indirectly lies within the sphere of Contract. If placed under any large division, it should fall within that of Personal Property. The avoidance of a contract owing to mistake, accident, or impossibility does not appear to be noticed among the excuses for non-performance; and yet these are important headings.

In Professor Pollock's *Principles of Contract*, and also in Sir William Anson's book, a good deal of space is allotted to the consideration of Contracts void or voidable on these grounds. Curiously enough, the very same headings, Mistake, Accident, Impossibility, and one or two more which are similar, are discussed in treatises on Equity, but have been either altogether omitted, or very scantily noticed in several works on Contracts,

especially the older ones. Text-books generally run on a beaten track; and Mr. Indermaur's *Principles*, though no work could be more simply and easily written, cannot be accounted an exception to this rule. We wish it were otherwise, for there is, we believe, a real want of some small work which should deal with Contract and Tort in a novel and scientific manner.

We are glad to find that recent points of importance which have attracted attention in Contract are considered by Mr. Indermaur; thus, on p. 33, we find the law as to contracts by advertisement, with the recent case of the *Household, &c., Insurance Company (Lim.) v. Grant*; and, on p. 242, the recent case of *Foakes v. Beer*, following out the principle of the well-known leading case, *Cumber v. Wane*, is introduced to our notice. Mr. Indermaur gives a list of Text books he refers to in his work; we see amongst them Chitty on Contracts, but no other work exclusively on that subject, not Addison or Leake, or Pollock or Anson; the book on Tort he mentions is Addison. The second part of Mr. Indermaur's work (on Tort) is exceedingly clearly written. Also, there is a chapter—sure to be useful—on Evidence in Civil cases, though the subject, perhaps, rather appertains to a book on Practice; but we think 25 pages too much to give to the subject of Damages in a work of this description.

Wilson's Judicature Acts, &c. By M. MUIR MACKENZIE and C. ARNOLD WHITE, Barristers-at-Law. Fifth Edition. Stevens and Sons. 1886.

The fifth edition of this standard work has quickly followed upon the fourth, and we congratulate the editors on the skill they have brought to bear on its production. It is increasing in bulk; but this is not to be wondered at, considering that annually much new matter, in the shape of Acts, rules and cases, comes into existence. We confess to the old-fashioned feeling that those who are first in the field with a good book should keep their position; and it is with this view that we would suggest to the editors the expediency of bringing out an annual edition of *Wilson*, with everything, Acts, cases and rules, brought down to date. There is more than one serious rival in the field; noting up is becoming irksome, and both branches of the Profession desire to see recent cases collected together in print. We have gone carefully through this edition, and, with the

exception of a few slight inaccuracies as regards references, we have found it distinguished, as the earlier ones, for care and thoroughness; and the Index leaves nothing to be desired. As it has been our pleasure to observe before, this book is the standard authority; and in it the practising lawyer will find everything that he wants to guide him in matters of practice. The publishers, too, deserve praise for the excellent style in which the work is produced.

Questions de Droit relatives à l'Incident Franco-Allemand de Pagny (Affaire Schnæbelé). Par EDOUARD CLUNET, Avocat à la Cour d'Appel. Paris. Marchal et Billard. 1887.

In a certain sense, and to a certain extent, it may be said that the Schnæbelé affair has ended as such an affair should have ended, under the unfortunate circumstance of its having arisen at all. But in another sense, and to an extent which it is impossible to define, it cannot be treated as having ended. For although the Chancellor of the German Empire, resting his demand on a principle of the Law of Nations, very properly moved the Emperor in Germany to order the release of M. Schnæbelé, as having entered German territory in the ordinary execution of his functions as an official of the French Republic, it is to be noted, and to be noted with regret by the friends of International Peace, that the Chancellor formally reserves the right of the German Courts to condemn the released functionary in a process for High Treason, *par contumace*.

Our able *confrère*, M. ClUNET, Editor of the *Journal du Droit International Privé*, of Paris, has seen that the Juridical interest of the Schnæbelé affair was therefore far from being at an end—we might, indeed, almost say that its real interest has now begun—and has embodied the conclusions at which he has arrived in a strongly but powerfully-written Essay.

In the space of little more than fifty pages, M. ClUNET covers a wide area in the discussion of points of Territorial and of International Law, and marshals a strong *catena* of recent cases of violation of territory in which the Government of the Helvetic Confederation sought and obtained satisfaction from the Governments whose agents had violated Helvetic soil.

Whether French soil really was violated in the act of the arrest of M. Schnæbelé will probably never be thoroughly cleared up. Each side will, as far as we can see, adhere to its own version, and the

mode of the arrest renders it in the highest degree difficult to determine on which side the truth most probably lies. We are inclined ourselves to suspect that both parties may, in a sense, be right, for it seems not at all unlikely that the body of M. Schnæbelé may have been partly in France and partly in Germany. In the similar case of a person fleeing from creditors to take Sanctuary, it has been held that the "more honourable" parts of the debtor's body being proved to have been within the Sanctuary boundaries, the "less honourable" must be taken to have gone with the more honourable, and the debtor was allowed the shelter which he sought. We cannot, however, profess to decide where the more honourable parts may have been in this case, and it would be difficult, if not impossible, to enter upon the discussion.

M. Clunet raises, as it seems to us, a needed note of warning against the contention expressly implied in Germany's reservation of the suit against M. Schnæbelé in the German Courts for High Treason, *par contumace*, for if this contention were, through inattention, supineness, or fear, to be acquiesced in by other nations, the European Concert might very summarily be broken up, and, indeed, all feeling of security would necessarily be gone.

If a Public functionary, whose primary duties are to the State in whose employment he lives, is to be arraigned of High Treason in another State, for acts done on the soil of his own nation, there can obviously be no security for Public functionaries should they chance to visit the States in which this view of the Extra-Territorial extension of Penal Law prevails. As M. Clunet forcibly puts it, Prince Bismarck or Count von Moltke, coming to Vichy for a course of the waters, might be arrested and tried under certain provisions of French Law, to which he draws our attention. It may be said,—this is an exaggeration,—but recent facts tend to strengthen M. Clunet's warning.

The mode of M. Schnæbelé's arrest was unquestionably violent and unseemly, as part of the proceedings under warrant of the Supreme Court of a Civilised European State. It may have been in strict accordance with the Law, but if so, we can only say, so much the worse for the Law. It may have been contrary to the Law, and in that case it should be, to that extent, disavowed. But it bears a suspicious likeness to a recent case in very high quarters which excited much outward protestation in Western Europe—the arrest and abduction of the Prince of

Bulgaria. We cannot say that we particularly believed in the sincerity of much of the chorus of disapproval which apparently greeted this event. The thing was shewn to be too easy not to arouse a desire to imitate it, if only on a small scale. What could be done with a Prince could surely be done with a mere Commissary of a Republic. Granted. But it must be remembered that even the Commissary, *pro tanto*, represented the Sovereignty of his country, and was clothed with its powers for the Public function of the preservation of Frontiers laid down by Treaty between two Sovereign States. Something more, therefore, it appears to us, was really at stake than the "implied safe-conduct," in virtue of which the German Emperor rightly decided to release M. Schnäbelé. The question of Sovereignty lay behind this, in the case of the Commissary as in that of the Prince, and the two examples are not to be lost sight of in any Juridical survey of the present condition of Europe. We believe that there is a relation between the two, however strange and unlikely it may seem. Curiously enough, perhaps the first case of the kind in this century was that of a British Diplomatic Agent, Mr. Bathurst, who "disappeared" at Perleberg, conveniently for Napoleon I., and was never heard of afterwards. Here, also, the Sovereignty of the State whose Envoy was made to "disappear," was involved in the case, which has never been adequately explained.

Laws of Intestacy in the Dominion of Canada. By J. ARMSTRONG, Q.C., C.M.G., late Chief Justice of St. Lucia, W.I. Montreal. Lovell and Son. 1885.

It is not often that our bread, cast upon the waters, as it were, in the pages of this *Review*, returns unto us after so many years as it has in the case of the valuable and interesting Essay now before us. The late Chief Justice of St. Lucia, we understand, was spurred on to write upon the intricate subject which he has here taken in hand by an article in our pages as far back as May, 1857.

We are very glad to have been the means of inspiring Mr. Armstrong for the work which he has accomplished, and we shall be still more glad if we receive further proof of his continued attention to the suggestions which we may from time to time throw out on questions of importance alike to the Legal Profession and to the general public.

It was with surprise that the learned author found, on going into the subject of the Laws governing Intestate Succession in Canada that, as a matter of fact, the Laws of no two Provinces of the Dominion were exactly the same. "An imaginary line, or a streamlet," Mr. Armstrong remarks, may be all that separates one Province from another, and yet "the Law may materially differ on one side from the other." It is, no doubt, desirable, as he urges, "where there is really no reason to the contrary, that the law should be uniform throughout the Dominion." Whether this "desirable" task is also an easy or a likely one to accomplish is another question, and we must confess that, on a careful survey of Mr. Armstrong's facts, we think it can only be a work of time and patience.

In some of the Provinces the computation of degrees is in accordance with the Civil, in others with the Canon Law.

In some Provinces of the Dominion, the Canon Law legitimation *per subsequens matrimonium* prevails; in others, it is as unknown as in England. On this very point of the Canon Law, it is not uninteresting to remember that we have had a recent succession turn in a Scottish Peerage case.

These differences are not inconsiderable. They prevail of course, also in the United Kingdom itself, legitimation *per subsequens matrimonium* being the law of Scotland, though it is not the law of England. The differences are salient, and they did not escape the attention of our *confrère* the Editor of the *Canada Law Journal* (then styled the *Upper Canada Law Journal*), in his annotations on our article on the occasion of reprinting it.

How to compose the differences which Mr. Armstrong has collected and tabulated, is a question for Canada rather than for us. We can scarcely do more than point to the example of the Emperor Justinian, and throw out the suggestion that a Tribonian and a Theophilus and a Dorotheus might not improbably be found in the Dominion. We may, indeed, go further, and say that one of the Codifying Triumvirate appears to us to be already marked out in the person of the late Chief Justice of St. Lucia.

In days when the mother country and her Colonies are ever seeking closer ties and a better knowledge of each other, such works as that which Mr. Armstrong has accomplished are of the highest value to the Statesman as well as to the Jurist. We are specially glad to bring together in one and the same number of this *Review*, works of so identical a purpose as those of

Mr. Dennistoun Wood for Australia, and Mr. Armstrong for Canada, and we hope to see more such works from the pens of both learned authors.

Etudes sur les Assurances sur la Vie. Par JOSEPH LEFORT, Avocat au Conseil d'Etat et à la Cour de Cassation. Paris. E. Thorin. 1887.

In this closely reasoned treatise, which is a collection in one connected whole of essays on various points of Life Insurance Law frequently giving rise to questions before the French Courts, our learned *confrère* of the *Revue Générale du Droit*, of Paris, shews himself an able lawyer, no less than a distinguished Laureate of the Institute.

In the course of sixty pages, M. Lefort passes in review the following important subjects on this branch of law, to each of which he devotes a chapter:—I. The right of the wife on whose behalf a policy has been taken out, under the circumstances of the husband's bankruptcy: II. The right of the creditor secured on a policy, in the case of the bankruptcy of the debtor: III. The acceptance of the benefit of a policy after the death of the stipulator: IV. The nature of the contract whereby one person is subrogated to another for the purpose of receiving the benefit of the policy: V. The nature of the contract which assigns to a third person the benefit of a policy: VI. The reduction of the *hereditas* in its relation to the stipulation of a policy on the life of a third person. VII. The recouping of the common stock (*communauté*) arising from premiums paid on a policy taken out by a husband for the benefit of his wife.

On all these questions, on several of which the French Courts have been of late years giving decisions utterly at variance with their previous attitude, M. Lefort is both an interesting and instructive writer. Not the least valuable feature of his Essay is the number of judgments which he prints *in extenso* in footnotes. By this means the *ipsissima verba* of the Courts are kept before the eye of the practitioner who consults the book, and besides the obvious utility of such a course, it throws all the light that can be desired on the points at issue. Some of the existing doctrine of the French Courts is very modern indeed, in certain cases not more than ten years old, but, whether old or new, it is equally the existing doctrine, and therefore we are

glad of the opportunity of studying it side by side with the able criticisms of M. Lefort. In Ch. III. we are transported to a region of Roman Law, in connection with the action *ex stipulatu*, the nullity of all stipulations after the death of the stipulator, &c. Here Bartolus and Voet come on the scene, as well as Pothier. Space will not admit of our going more fully into the details of the several chapters on the present occasion, but we may confidently recommend M. Lefort's valuable contribution to Legal Literature to all English practitioners who may require a handy companion to the intricacies and conflicting decisions of French Insurance Law.

Revista Forense Chilena. Director, Enrique C. Latorre. Santiago de Chile. 1886-7.

South American Legal Literature is rare on our tables, and we welcome our brother from the Pacific slope of the Andes with a greeting all the more cordial from our remembrance of the long unsettled condition of the affairs of the Republics on the Chilian and Peruvian seaboard. We trust that the fact of Sr. Latorre being in the second year of his publication is an omen of hope for the future progress of that portion of Latin America. We observe that among his contributors the Editor of the *Revista Forense* numbers the Rector of the University, the General Secretary of the University, several Judges of the Supreme Court and of the Court of Appeal, and several members of the Faculty of Law and Political Science, besides advocates in Santiago and other parts of Chili. The discussions in the numbers before us are largely concerned with the Civil and Penal Codes of Chili, but they extend also to questions such as the Retroactive effect of Law, and they furnish the Chilian Jurist with information concerning the Reorganisation of the Teaching of Law in Italy. We return with interest the New Year's good wishes offered to us by our brother of Santiago de Chile, not only for 1887, but also, we hope, for many a year to come.

THE LAW MAGAZINE AND REVIEW.

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I.—THE REFORM AND CODIFICATION OF THE LAW OF NATIONS.*

IT has sometimes occurred to me to ask whether the title of your Association is not somewhat ambitious, somewhat calculated to raise a doubt in the minds of those unacquainted with its work as to the practical value of your proceedings.

The Codification of the Law of Nations—the end at which we aim—is, it may be true, a consummation which no one now living may hope to see. And if those who attend your Conferences contented themselves with discussing the reasons in favour of a written Code of International Law, and with exhortations to exertion in bringing about that desideratum, we should, I think, deserve the epithet of unpractical which some are not indisposed to launch at us.

But, if ever identical views of what should be the practice of the different nations of the earth in their dealings with each other are to be reached, it must surely be by the removal or the lessening of the divergencies prevailing in their national laws and customs. It is to this end that the labours of those attending the Conferences of the Association have been chiefly directed in the past; and it needs only a glance at the subjects suggested for consideration

* The Inaugural Address, delivered in the Guildhall of the Corporation of London by Hon. Mr. Justice Butt, as President of the London Conference of the Association, 25th July, 1887.

and discussion now to perceive that no deviation from the course hitherto pursued is contemplated. Far from being unpractical, I venture to say that the proceedings at the Conferences hitherto assembled have been eminently business-like and practical. If the results have not been altogether commensurate with the hopes and the desires of those concerned, let it not be forgotten that we are labouring, not for ourselves alone, but for those who come after us; and that the time which has elapsed since the foundation of your Association, though appreciable in the life of an individual, is small indeed when taken into account as part of National or International history.

If any doubt as to the practical value of your labours exists, let me point, amongst other matters, to the success which has attended your efforts to assimilate the practice of different nations in respect to the adjustment of General Average claims on the basis of the York and Antwerp Rules.

The subjects suggested for discussion at this, the 13th Conference of the Association, are of such wide and varied interest and importance, that it would be impossible, within the prescribed limits of an Inaugural Address, to do more than glance at one or two of the number.

The most important of the topics suggested for discussion are undoubtedly those which relate to what is called Public as contra-distinguished from Private International Law. To one of these more important subjects I propose to refer by-and-bye.

But let me, in the first instance, say a word on a matter to which your attention is invited, and in respect of which the aims of the Association should have a chance of early realisation.

For a time it seemed as if the efforts of the Association to bring about uniformity of Contracts of Affreightment were likely to result in a speedy and successful issue.

At the Conference held at Hamburg, in August, 1885, a draft Bill of Lading was presented to the meeting, which embodied by reference a "Code of Affreightment," also submitted to the members attending that Conference.

The object of that mode of dealing with the matter was, I understand, to avoid undue length of the Bill of Lading itself. Now, whilst I agree with the opinions expressed by the majority of members at that meeting, I doubt whether the *modus operandi* then suggested is the best that might be adopted. The Rules forming the "Code of Affreightment" may be good in themselves, but they appear to me to deal with so many matters of detail, with so much that is of comparatively minor importance, that I should despair of inducing shipowners, at the present time, to adopt a form of Bill of Lading incorporating all those Rules. On the other hand, I see no reason why a short Bill of Lading may not be framed, containing within its four corners all essential stipulations binding shipowner and merchant alike. The real difficulty lies, not in the form of the Bill of Lading, but in the question of the insertion of one proviso with reference to which merchants on the one hand, and a large number, if not a majority, of shipowners on the other, are at issue.

The real difficulty is, that shipowners refuse to accept any Bill of Lading which leaves them responsible for the negligence of their servants—the masters and crews of their vessels.

At a meeting of the members of this Association, held at Liverpool, in 1882, a form of Bill of Lading, exempting the shipowner from liability for the negligence of his servants, was approved of; but, at the more recent Conference at Hamburg, in the month of August, 1885, a Resolution, to the effect that the shipowner ought not to be allowed to protect himself from such liability, was proposed and carried by a considerable majority.

Since that time the matter has not been allowed to rest. The Chambers of Commerce of two most important Commercial Cities—Hamburg and London—have given expression to opposite views on this question; the Chamber of Commerce of Hamburg holding that the shipowner should, the Chamber of Commerce of London that he should not, be exempt from liability for the negligence of his master or crew.

The controversy has, it seems to me, been embittered by the use, by some of the large lines of steamers, of Bills of Lading exempting them from almost every sort of responsibility. These so-called contracts amount, in reality, to little more than this: "You pay me the freight, and I will do what I please with your goods." How comes it that such conditions are ever accepted by the merchant? This question admits of one answer, and one answer alone. He accepts simply because he has no choice. Submission is forced on him, and forced on him in defiance of the fundamental duties of the carrier.

Were the majority of shipowners inclined to insist on the imposition of conditions so manifestly unreasonable, the labours of this Association to reconcile the apparently conflicting interests of merchant and shipowner respectively must of necessity be unavailing. In that case, we had better stand aside, and let the Legislatures of the different countries deal with the matter.

I believe, however, that merchants and shipowners, alike, desire only a reasonable solution of the question; and that the real point to be determined is what is reasonable.

There are those who think that when once an employer of labour—whether shipowner or other person—has taken due care and precaution to secure, so far as may be, the competence and trustworthiness of his agents or servants, he ought not to be held Civilly, any more than he is held

Criminally, responsible for their wrongful acts. That is a question of very large dimensions, on which opinions may differ, and which it is not for me to determine ; but it may not be out of place to remind those who hold this opinion that it is a view of the employer's liability which the Legislatures of the great majority of civilised States refuse to sanction.

But apart from this more general question of the responsibility of employers for the negligence of their servants, the shipowners contend that in their case an exception should be made, on the ground of the very large responsibilities necessarily placed upon servants who, from the nature of their occupation and employment, are to an unusual extent beyond the control of the employer. The contention is worthy of careful and respectful consideration, but I would venture to suggest, for the consideration of those by whom it is put forward, whether the Directors of a Railway Company have, for practical purposes, more control over the engine driver, who fails to see, or who neglects to obey, a signal, than has the shipowner over his Captain, who runs his vessel on a rock, from failing to observe, or to appreciate, the timely warning of the lighthouse ? Again, for all practical purposes, has the man who sends his carriage or his cart along the highway more control over his coachman or his driver who runs down the carriage of a third person, than has the shipowner over his Captain who runs down the vessel of a third person on the high seas ?

These are matters on which I do not presume to pronounce an opinion *ex cathedra*. I merely desire to suggest them for the consideration of those engaged in the controversy, in the hope that the honesty of purpose which I am persuaded animates all parties concerned, aided by mutual forbearance, may ere long bring your labours, in this branch of your undertaking, to a satisfactory issue.

I pass on to the subject which I regard as the most important of the topics suggested for the consideration of the Conference: "The Progress of International Arbitration." It is impossible to conceive any question of more universal interest, more closely touching the happiness of the human race than this. On the solution of this depends the alternative of Peace or War, as the inheritance of those who come after us. The hope that in our day, or in that of our children, or even of our children's children, the peaceful settlement of all disputes between nations may supersede the rougher arbitrament of war, may well be regarded as beyond the pale of practical aspirations. And a time, when the standing armies of Europe are on a larger scale than has hitherto been known, may at first sight appear ill-chosen for raising our voice in favour of reason and of law, as opposed to violence and to bloodshed. But signs of the advent of a better state of things are not wanting. The goal may be distant, but I for one refuse to believe that it is unattainable. Be this as it may, one thing is certain, that each step on the way, each international dispute settled by peaceful means, even if it lead us but little nearer to the end we have in view, is, at all events, a step in the right direction, and one which may save an incalculable amount of human misery and suffering.

It is for this reason that we are all deeply interested in the Progress of International Arbitration; it is this that removes our action in the matter from the region of the visionary and the chimerical, and renders it, in my judgment, practically beneficial.

I have spoken of the standing armies of the European States. I believe that the vast proportions which those standing armies have assumed, adverse as they may at first sight appear to be to our peaceful aspirations, will, ere very long, be found to make for rather than against us. War, with all its attendant horrors, is not many degrees worse

than the state of things existing now in time of peace. The raising and maintaining of these huge armaments in most countries of Europe is simply eating the heart out of the people. It is not merely the fiscal burthen cast on the population for the clothing and maintenance of these masses of soldiery : but it is that every man under arms is an appreciable diminution of the working power of the community—an unit withdrawn from the sum of the product of that human industry whereby nations grow rich and peoples prosper. It may be that the limit of endurance has not yet been reached ; that the cord has not yet been strained to the breaking point. “ Things must get worse before they can get better,” was the observation of one of the most ardent spirits amongst those engaged in the struggle against the invasion of the people’s rights by our own Charles the First—and he was right. So in the case of the armaments of Europe. They promise to go on increasing until they reach a point that flesh and blood will not endure ; and then will come the day of those who have raised their voice, hitherto in vain, in favour of Peace.

“ If citizens were wise, war is a game that Kings would very seldom play at,” was the saying of a shrewd politician and able writer, whose opinions on the absurdity, as well as the wickedness, of war, as a means of settling disputes, are, I think, daily and hourly gaining ground.

Again, whilst the armed force at the disposal of the Governments of Europe was never so large, whilst the engines of destruction, developed by the marvellous resources of Science, were never so formidable ; on the other hand, there never was a time when sovereigns and rulers were so anxious to appear at least to conform to the dictates of Equity and of Justice, as embodied in the works of great writers on International Law. Now-a-days, there is no Sovereign, however despotic, there is no State, however aggressive, that does not, when going to war, pretend

at least to be guided by respect for Public Law and Morality. The aggressor is ever concerned, so far as may be, to

"Work his wantonness in form of law,"

and he takes possession of his neighbour's land with the most solemn asseveration of his respect for the rights of property. The voice is Jacob's voice, though the hands are the hands of Esau. We may rest assured that this homage paid to virtue will, in the long run, not fail to produce an effect; and that, as time goes on, the great ones of the earth will feel more and more constrained to make their practice in some measure conform with their preaching.

Once more. It is satisfactory to observe a growing tendency among nations to refer matters in dispute between them to Arbitration. Although by no means the first, the most important occasion on which this mode of preventing misunderstanding from seething into war was the signature of the Treaty of Washington, whereby the demands of the United States of America on the English Government were referred to, and adjudicated upon by, the Tribunal which sat at Geneva. The result of that Treaty was that England was condemned to pay to the United States the sum of £3,000,000 in respect to what were known as the "*Alabama Claims*." There was an inclination in this country—perhaps not unnatural among those who had to pay—to decry that settlement of a serious misunderstanding; but the more sober judgment which time and reflection have engendered has come to regard that transaction as altogether wise and prudent, and honourable alike to those who succeeded and to those who were beaten in the controversy at Geneva. In an able Paper, read by him at the Conference of this Association, held at Cologne, in the year 1881, Mr. H. Richard, M.P., to whom more than to any other Englishman the cause of International Arbitration is indebted, called attention to the fact that the Geneva Award was not alone

the immediate and direct achievement of the negotiators of the Treaty of Washington. By that same Treaty, a Mixed Commission was constituted, for the settlement of all outstanding claims by subjects of Great Britain, on the one hand, and by citizens of the United States on the other, against the Governments of the two countries respectively. That Commission met, and the conclusion at which it arrived was that the Government of the United States should pay to Her Britannic Majesty, in respect of those claims, a balance amounting to near £400,000. Since that time, who has failed to observe the more friendly feelings that have animated both the Government and the people of the United States and of this country, in their dealings with each other? Who can doubt but that the improvement is the direct outcome of the settlement of the burning questions which were threatening the peaceful intercourse of the two nations?

Many International disputes have since then been settled by the peaceful means we advocate, and there is reason to hope that for the future it will be the custom in Treaties of Peace, as it has been in Treaties of Commerce, to insert what is known as an Arbitration Clause.

In any case, by continuing to raise its voice against the monstrous absurdity and wickedness of war, and in favour of the more rational solution of International disputes, this Association cannot fail to render valuable aid to the cause of Humanity.

C. P. BUTT.

II.—LOCAL GOVERNMENT IN SCOTLAND.

THE promise has been made for some sessions of a Local Government Bill. Its objects, it is understood, will be the simplification of county government, and the representation in the governing body of the interests of the large classes at present excluded from sharing in the administration of affairs. It has been indicated that this measure will apply to the three kingdoms. Whether the circumstances of this decade will allow of such a measure passing into law remains to be seen. A fair question, however, to be put to all makers of laws is,—Do you know what you are going to alter? Unfortunately, the question is not put; for it is quite clear, from the mass of peddling laws which encumber the statute book, that it is more the removal of striking grievances than the general improvement of public law and justice that influences Parliament. To be fair, one must acknowledge that many a Bill when first issued shews careful draughtsmanship; it is, however, when it has been passed through the stormy sea of Committee, and presents itself mangled or swollen that it becomes the painful subject of lawyers' study.

Local Government as it is in England has been made the subject of two recent and interesting volumes,—*Local Government*, by Mr. M. D. Chalmers; and *Local Administration*, by Messrs. William Rathbone, Albert Peel, and F. C. Montague. But these volumes deal with England alone. Mr. Chalmers does not mention Scotland from his first page to his last. Mr. Rathbone says,—“To treat of “local self-government in Ireland would require a volume. “Local institutions in Scotland have a character of their “own. Most of the principles here laid down are, notwithstanding, applicable to both of the sister kingdoms.” (p. 17.)

The last sentence, so far as regards Scotland (I cannot speak for Ireland), scarcely shews that the writer understands what the present Local Government of Scotland is. The work of Messrs. Goudy and W. C. Smith on *Local Government* (1880), deals with Scottish affairs alone, and is invaluable as a book of reference. It is not, however, written for general readers, as its tables and statistics sufficiently shew.*

The unit of Local Government in Scotland is the Parish. The whole of Scotland is divided into parishes. There are, in theory, no lands extra-parochial, as there were in England until the Acts of 1857 and 1868 merged these lands in existing parishes. The county has no subdivision into hundreds and townships. How old the parish system is in either country no one knows. In England, the historical secular township was so completely merged in the ecclesiastical parish or district assigned to a church or priest, that, as Bishop Stubbs says, the idea and even name of the township is frequently at the present day sunk in that of the parish. Still, the hundred and township were too vital parts of English life to be lost sight of as a rule. In Scotland, the division into parishes was possibly roughly made about the time of David I., but there were no townships or hundreds to be dealt with. The Scottish parish, therefore, historically has always been what the English parish is only in respect of its usurpation of civil or township authority,—both a secular and an Ecclesiastical authority. Mr. Gomme, in his very useful bibliographical volume on “Local Institutions” (1886), says,—“It is very important to bear in

[* As at once a Constitutional Treatise, and a work of reference for the general reader, mention may here be made of a volume of *Lectures on The Government, Constitution, and Laws of Scotland*, by ALEXR. ROBERTSON, M.A., Barrister-at-Law. Stevens and Haynes. 1878. Sect. VII. deals briefly with Local Government, and expresses the belief that Legislation on this subject must soon be taken in hand.—ED.]

"mind the original secular as well as sacred position of the "parish church." He is speaking of England, but his language is more strictly applicable to Scotland. In England, when the secular business is disposed of at a vestry meeting of a parish in which a township has been merged, the meeting is "primarily" a meeting "of the "township for church purposes." (Stubbs' *Constitutional History*, Vol. I., p. 97.) In Scotland, the parish itself dealt with secular and sacred things directly, from the beginning, so far as the influence of the baron on the one hand, and the Bishop or Presbytery on the other, permitted. A comparison of the Ecclesiastical characteristics of the parishes of England and Scotland will illustrate their essential differences. In Scotland, as in England, every person is presumed to be a member of the National Church, and the same burden of assessment for Ecclesiastical purposes is laid on churchman and dissenter. There are four principal varieties of parish; the first is the landward, or country parish; the second is the burghal, or parish containing a town; the third is the burghal-landward, or parish partly rural and partly urban; the fourth, the parish *quoad sacra*, is a parish cut out of any of the three preceding, which has its own church and minister, and maintains itself without assessment, but for all civil purposes remains a part of the mother parish, and whose parishioners remain liable for the maintenance of the mother church. The heritors or proprietors of land, in the first and third class of parishes, have to provide and maintain by assessment imposed by themselves upon themselves a church and a manse; in the burghal parish no manse requires to be provided; in the parish *quoad sacra* there are no heritors' burdens except those imposed for the church, or church and manse of the mother parish. The heritors have no voice as such in the selection of the minister, but the area of the parish church is divided among them in nice recognition of

the respective extent of their lands. In some parishes one man may be the sole heritor, and he imposes an assessment on himself when needful, or when the Presbytery, which has a general oversight of all Ecclesiastical buildings, directs repairs to be made. The minister is not a heritor, and can only, as a matter of courtesy, be invited to attend a meeting of heritors. He is proprietor* of the manse, *quà* liferenter, while he is minister of the parish, but repairs can only be ordered or paid for by the direction of the heritors. The election of the minister lies with the persons, male and female, whose names appear on the communion roll of the parish, who may or may not be heritors. The management of the church's spiritual affairs is in the hands of the Kirk-Session, which consists of the minister and elders, none of whom require to be heritors. The heritors form a semi-corporate body, and have the custody of the church and graveyard. It will be seen that the differences of organisation between English and Scottish parishes are well-defined. Mr. Chalmers says, speaking of England, "The minister is the clerical, and the churchwardens are the civil officers of the Ecclesiastical parish." (*Local Government*, p. 46.) To make this sentence true of Scotland we must alter it thus:—"The minister and Kirk-Session are the clerical, and the heritors are the civil officers of the Ecclesiastical parish." In theory the heritors, who are the landowners of the parish, are the parishioners and congregation. As a matter of fact, sometimes not a single heritor enters the church from year's end to year's end; but, as the heritors, however true to dissent, are bound to maintain the parish kirk for the parish, they generally look well after the preservation of the Ecclesiastical buildings, and the Presbytery may be trusted to see that they do not neglect the manse. A "vestry" is only known in Scotland as the minister's

* See *Cowan v. Gordon* (1868), 6 Mac., 1018.

robing room (and that only occasionally), and a "church-warden" is never heard of.

The Scotch parish, in its Civil aspect, has now two distinct Boards—(a) The School Board, (b) the Parochial Board. In former times the heritors had the charge of the poor and the parish school, and were bound to provide the parish's quota to the defence of the country. The parish schools of Scotland were maintained by the heritors of each parish. They built the schoolhouses and selected the teacher. Since the passing of the Scotch Education Act of 1871 every parish in Scotland has its School Board, and every Board its own clerk and other officers. The Parochial Board, by the Poor-Law Act of 1845, assesses for poor rates over the whole of each parish, whether it contains parishes *quoad sacra* or not; and as Local Authority under the Public Health Act of 1867, it assesses for sanitary purposes over the whole parish, exclusive of police burghs constituted under the General Police Act of 1862 (to which I shall again refer) and of districts constituted under the Public Health Act as "special drainage" districts. But there are still fifty-six rural parishes, I am informed by the Secretary to the Board of Poor Law Supervision, in which the Local Authority yet consists of the heritors and Kirk-Session, the representatives, that is, of the civil and sacred sides of the parish as a county division.

When Scotland was divided into counties is unknown. The first complete list of counties was made for Edward I. of England, and does not much differ from the present list. It is in the highest degree improbable that the country was divided into shires in the same manner as it was afterwards subdivided into parishes. Probably at first the "county" consisted of just as much land as the first tribe or colony which first settled on it could conquer and hold together. (Dove Wilson on *The Sheriff Court*, p. 5.) In former times the Courts of Regalities and Royalities held contending

jurisdiction in each county, but these Courts are now matters of purely historical interest. There is one Sheriff for each county or group of counties, with Sheriffs-Substitute under him resident in each county. There is an appeal from the Sheriff-Substitute to the Sheriff-Principal, but the whole tendency of modern thought is to make all the Sheriffs of equal rank. They are all appointed directly by the Crown, and are almost without exception members of the Scottish Bar.

There are thirty-four counties in Scotland as counties are learned at school. But as counties are counted by Act of Parliament there are thirty-three, Ross and Cromarty being reckoned as one county. The city of Edinburgh forms a county by itself. Lanarkshire, under various statutes, forms for assessment purposes three counties—the county of the Upper Ward of Lanarkshire, the county of the Middle Ward of Lanarkshire, and the county of the Lower Ward. Under the Publicans' Certificates (Scotland) Act, 1876, it is treated as two counties—the Upper and Middle Wards constituting one and the Lower Ward another. So far, however, as county government, properly so called, is concerned, there are thirty-three counties. The administration of these counties is entirely in the hands of the Commissioners of Supply and Road Trustees of each (historical) county. They are the only county rating authorities.

Commissioners of Supply were first appointed by the Act of Convention in 1667, and the necessary qualification of any Commissioner then was that he should be proprietor, superior, or liferenter of lands of the annual value of £100 Scots. Reckoned in sterling money of the present day, £100 Scots represents £8 6s. 8d., so that had the qualification remained at that moderate sum, the Commissionership would have been within the reach of all who care to take any share in the burden of county affairs. By the Valuation

Act of 1854 and subsequent Acts of 1856 and 1857 the qualification was altered. Any proprietor of lands of the yearly value of £100 sterling, or the husband of such a proprietor ; the eldest son of the proprietor of lands of the yearly value of £400 sterling ; and the factor (in the absence of the landowner) of any property the annual value of which is £800 sterling, is now entitled to apply to be enrolled as a Commissioner of Supply of the county in which the property is situated. The Sheriff of the county, magistrates of Royal and other burghs, and the senior magistrates of police burghs are *ex officio* Commissioners. The Commissioners of Supply, by their assessors, make up annually the Valuation Roll of the county, and upon the persons whose names appear on this roll the Commissioners levy the general county rates. A committee of Commissioners hears annually any appeals against the valuations made by the assessors. The management of the county police is in their hands. The following are the sub-committees of the county of Lanark, which may be taken as a representative county :—1, Committee for arranging business at next annual general meeting ; 2, County's quota of the Glasgow Court-houses Commissioners (the Court-house being maintained by contributions from the County authorities and Town Council of Glasgow) ; 3, Court-house committees—(a) Upper Ward, (b) Middle Ward ; 4, Enrolment of Commissioners of Supply ; 5, Finance ; 6, County's quota of Glasgow District Lunacy Board ; 7, Parliamentary Bills ; 8, Police, with sub-committees for (a) Hamilton, Wishaw, and Motherwell districts, (b) Lanark district, (c) Airdrie district, (d) Lower Ward, Hillhead, and Govanhill (the two latter police burghs closely adjacent to Glasgow) ; 9, Prison Visiting ; 10, County Valuation—(a) Upper, (b) Middle, (c) Lower ; 11, Local Authority under Contagious Diseases (Animals) Act, 1874 ; 12, Property and Income Tax—(a) Upper, (b) Lower, and (c) Middle. The

Commissioners maintain the militia by assessments from parishes. The general purposes of assessments are payment of salaries of county officials; expenses connected with apprehension, prosecution, and punishment of criminals in county, keeping up Court-houses, &c.; expenses of striking "fiars prices;" * damage by riots. A portion of the charges nominally paid by the Commissioners are, however, directly paid by grants from the Crown.

The Roads and Bridges Act of 1878 constituted, like almost every new Act, a new Board. The County Road Trustees, as the members of this new governing body are called, are partly chosen by vote. The Commissioners of Supply are *ex officio* trustees; so is one representative of each incorporation or incorporated company assessed as owners on a certain valuation. The elected trustees are (a) chosen by the ratepayers of each parish, the number of representatives being in proportion to the population; (b) representatives of burghs not having control of their own roads. The Trustees assess for maintenance and repair of roads and bridges, and for the construction of new roads and bridges.

The administration of Lunacy affairs in Scotland is under the General Board of Lunacy, and twenty-two district Boards. The boundaries of those districts are sometimes co-extensive with counties; sometimes one district includes three or four counties. Edinburgh—the county of the city of Edinburgh—includes, besides Edinburgh, five parishes in Midlothian; the remaining Midlothian parishes are dealt with in the Midlothian and Peebles district. The district Boards are elected by the Commissioners of Supply, and magistrates of Royal and Parliamentary burghs within the district. The assessment for lunacy purposes is paid in the county wholly by the owner of land; in a burgh, by owner

* Fiars prices—price of grain for year. This regulates many payments, such as stipends of parochial clergy, &c.

and tenant equally. The district Board intimates to the clerk of the Commissioners of Supply, and to the chief magistrate of each district, the amount of contribution required to be raised. The General Board of Lunacy is appointed directly by the Crown.

The supply of "Sheriff Court-houses" for a county is determined by a meeting of Commissioners of Supply; and the expense of erection, &c., is paid, half by the Treasury, and half from a special Court-house assessment levied on owners by the Commissioners and Magistrates of Burghs (not Police). The expense of maintenance is defrayed entirely by the Treasury.

Justices of the Peace were introduced into Scotland precisely three hundred years ago by the Act of 1587, c. 82; but we do not hear of their full establishment as a working body for nearly eighty years afterwards. "By the Articles "of Union," says Bell, in that *Dictionary of Scotch Law* which is the indispensable companion of anyone writing on Scottish affairs, "the laws for regulating the trade, customs, "and excise are declared to be the same in Scotland as in "England; and, accordingly, Justices of the Peace in "Scotland are vested with the same powers with those in "England in matters touching the customs and excise; and "by the statute 6 Anne, c. 6, the same powers were given "to Justices of the Peace in Scotland which had formerly "been enjoyed by Justices of the Peace in England in "relation to, and for the preservation of the peace, leaving "the trials and judgments to be regulated by Scottish "forms and customs." Justices of Peace in Scotland are intrusted with the administration of statutes as to planting and inclosures; the regulation of highways; questions of revenue, customs, and excise; aliment of bastards; actions for servants' wages; expenses of march fences, and straightening of march fences; and constitute a Court in which debts under £5 may be sued for; they

license theatres, and grant spirit licenses; they administer the Fishery Acts, and numerous other special statutes of so complicated a character that the writer above-quoted says,—“it may be stated as a general proposition, that no Justice can safely act, in virtue of statutory powers, “without having before him the particular statute conferring these powers.”

There are many distinctions between the Justices of Peace of England and of Scotland. A property qualification of £100 yearly value is required in England; there is no such qualification in Scotland; anyone nominated by the Lord-Lieutenant of a county may be a Justice, except a practising solicitor. There is no Justice of Peace *custos rotulorum* in Scotland (the office is represented by that of the Sheriff-Clerk of each county), and no Quorum of Justices with superior powers. Scottish Justices have no control over the county police; that is the business of the Commissioners of Supply. Justices levy no rates.

A peculiar feature of the Local Government of Scotland is the Police Burgh. There are four or five varieties of burghs in Scotland. It will be sufficient for the present to confine our attention to Royal and Police Burghs. The Royal Burghs are 70 in number; many of these have special Police Acts of their own. Excluding assessments for Police, Public Health, and kindred purposes, the chief assessments now leviable in burghs are for—(1) Valuation; (2) Voters' registration; (3) Registration of births, &c.; (4) Lunacy; (5) Burial; (6) Court houses; (7) Contagious diseases (Animals); (8) Roads and bridges. The number of members of Council varies from fifty to six.

The Burghs created under the general Police Acts of 1850 and 1862 are specially known as Police Burghs. On application by seven householders in the district, the limits of which are defined in the petition, the Sheriff of a county is empowered, if he thinks fit, to declare such a dis-

trict to be a "populous place" and a Burgh. I avail myself of Messrs. Goudy & Smith's notes to summarise the powers of such burghs. The local authority is the Police Commissioners, who are an elected body, and have most of the powers of a corporation. Their numbers cannot exceed twelve or be less than six. But where the burgh is divided into Wards (which is when the population amounts to 5,000), the number of Wards and Commissioners must be three for each Ward. The electors are occupiers of lands of the value of £4 and upwards. The vote is by ballot. The qualification of a Commissioner is the same as that of a voter. Commissioners hold office for three years; one third retire annually. The principal purposes of Police Burgh administration are watching, cleansing, lighting, paving, supplying water to, and improving the Burgh; the Commissioners are the local authority under the Public Health Act; the Bakehouse Regulation Act; the Rivers Pollution Act; the Public Parks Act; the Artisans' Dwellings Act, &c. The Burgh expenditure is principally met by a police assessment on occupiers of lands within the Burgh as appearing on the County Valuation Roll. The Commissioners in such Burghs have no power to value separately; they must take the valuation as made up by the Commissioners of Supply of the county; but the chief magistrate of every Police Burgh is, in virtue of his office, a Commissioner of Supply (as well as Justice of the Peace) for the county. The influence of one such representative on a board almost entirely composed of county gentlemen is small. Special rates may be levied for special drainage, public parks, municipal buildings. The chief magistrate of each Police Burgh is usually by courtesy called Provost, like the chief magistrate of a Royal Burgh.

Undoubtedly the facilities afforded by the Lindsay Act (1862) for the creation of Police Burghs have done much to postpone in Scotland the demand for a better system of

Local Government. Any large village wishing to have charge of its own affairs can easily, except for valuation purposes, become independent of the county gentlemen who form the county authority. The machinery is very simple; the expense is small. The Act has been largely taken advantage of. Its popularity has disclosed its errors. For example, the suburbs of Glasgow have one by one taken advantage of its provisions, and become Police Burghs independent of Glasgow. The result is that at present Glasgow is surrounded by nine Police Burghs, over which it has no rating powers. These Burghs are all composed of Glasgow citizens, and if things continue as they are, in a few years Glasgow will be in an analogous position to London; all its citizens, except the very poorest, will live beyond its municipal boundaries. These Burghs obtain the full benefit of parks maintained by Glasgow rates to which they contribute not a penny, and receive Loch Katrine water at a rate of only 2d. in the £ greater than Glasgow, although the Glasgow rates alone bore the enormous cost of bringing that water from the distant Highlands. It is but natural that the growth of these parasite Burghs should have encouraged a spirit of rivalry and estrangement between Glasgow and the suburban authorities, and the execution of any great and comprehensive scheme is made impossible by the readiness by which every little Burgh springs to arms, and, regardless of expense, opposes tooth and nail, in Westminster and elsewhere, the attempts of the Corporation at local unity of administration. This suggests a not inappropriate illustration of the many different forms of Government under which a Scotsman lives, especially in the neighbourhood of a large city. The following "true tale" may be taken as an example:—Glasgow, for all parliamentary and municipal purposes, is bounded on the west by the river Kelvin, whose graces are now existent

alone in song. Across the Kelvin, and connected with Glasgow by a broad and level bridge, is the suburb of Hillhead. It has no manufactures, and is purely residential. A few years ago it was declared to be a "populous place," and formed into a Burgh. It includes 130 acres, and has nine Commissioners of Police to look after its interests. Beyond Hillhead, but with no line of demarcation visible, lies another residential district called Kelvinside, extending to about 716 acres. In this district are the Glasgow Royal Botanic Gardens. Kelvinside has no local Government, and is entirely under the control of the Commissioners of Supply for Lanarkshire. Its inhabitants, like those of Hillhead, are almost entirely Glasgow merchants. In 1886-7 a Bill was promoted for the union of the Burgh of Hillhead and the district of Kelvinside to Glasgow. When the Bill was before a Committee of the Lords in February, 1887, the following table was handed in by one of the witnesses, shewing "List of Governing and Assessing Bodies in area proposed to be Annexed":—

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| 1.—The Commissioners of Supply of the County of Lanark. | Assess for and have control of police in whole area, and assess for general county rates in whole area. |
| 2.—The County Road Trustees of the County of Lanark. | Assess for Road debts in more than five-sixths of area, and upon more than half of total valuation or annual assessable value. |
| 3.—The County Road Board of the Lower Ward of Lanark. | Assess for maintenance and have control and management of roads in more than five-sixths of area, and upon more than half of total valuation or annual assessable value. |
| 4.—The Parochial Board of the Parish of Govan. | Assess for Poor rates in whole area. |
| 5.—The Parochial Board of the Parish of Govan, as Local Authority under the Public Health Act. | Assess for sanitary purposes in more than five-sixths of area, and upon more than half of total valuation or annual assessable value. |

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| 6.—The Parochial Board of the Parish of Govan, as Local Authority under the Public Health Act. | Assess for special drainage rate in Hayburn Special Drainage District, three-eighths of total area. |
| 7.—The School Board of the Parish of Govan. | Assess for School rates over whole area. |
| 8.—The Justices of Peace of the County of Lanark. | Have control of licenses in whole area. |
| 9.—The Glasgow Corporation Water Commissioners. | Assess for Water in whole area. |
| 10.—The Glasgow District Board of Lunacy. | Assess for Lunacy in whole area. |
| 11.—The Glasgow Court-house Commissioners. | Assess over whole area for Justiciary and Sheriff Court-houses in Glasgow. |
| 12.—The Commissioners of the Burgh of Hillhead. | Assess for Lighting, Cleansing, and Sanitary purposes in less than one-sixth of total area, and upon less than half of total valuation or annual assessable value. |

To which assessing bodies I may add—

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| 13.—The Heritors of the Parish of Govan. | Assess over whole Area for maintenance of Church and Manse of Govan. |
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This sample of complicated government did not apparently impress the Committee of the House of Lords as in any way remarkable, for they threw out the Bill, though it had passed the Commons. No doubt it is not so bad as the state of matters disclosed by Mr. Rathbone when he stated to the House of Commons that in the place where he lived there were no less than thirty-five different local authorities! (Chalmers, *op. cit.*, pp. 17, 18.) The Scotsman of an average rural district has of assessing local authorities six—(1) The Commissioners of Supply, (2) the Parochial Board, (3) the School Board, (4) the Road Trustees, (5) the Board of Lunacy, and, if he owns land, (6) the Heritors of the Parish.

No one can be practically acquainted with the working of county affairs without appreciating the labours of the

gentlemen who, without reward and often without public recognition, serve on county committees. Their administration is pure, and almost always disinterested. County Boards do not cost much, and they know little of the acrimonious discussions which deter so many men of business ability from offering themselves as candidates for municipal or other offices attainable only by public contest. They provide almost the only opportunity, nowadays, of young men entering public life without engaging in party politics. But the feeling of the generation is too strong for them. It is not the existence of the County authority itself that is objected to; it is that in fact it is only one of many authorities. No doubt, faulty legislation is to blame for the multiplication of authorities. But why has Parliament consented to the calling into existence of fresh authorities? Because the County Board—the Commission of Supply—is essentially a non-representative and one-sided body. Instead of mending the old machine, Parliament sanctioned little auxiliaries being placed beside it. The intention was excellent. The result is deplorable. Not one man in fifty can tell you what are the authorities under which he lives, what are their respective duties, or what are the qualifications necessary for serving on any particular board. It is, of course, essential that the old obligation on Heritors to maintain the parish church and manse should be abolished. The rule is antiquated and vexatious. The congregation of each church should bear its own burdens.

The question presents itself, in what direction should the reform of Local Government in Scotland be sought? The answer seems to be, in the simplification of authorities by restricting powers of assessment and administration to *two* bodies in each county.

In Scotland there is not the same objection to the "parish" being taken as the primary administrative unit as there is in England. Mr. Rathbone's chief objection to

the parish seems to be the inequality of parish populations, some large, some small. There is nothing in England strictly analogous to the Scottish system of breaking up a large parish into smaller parishes *quoad sacra* (the statute 14 Car. II., cap. 12, had a different object). Where a parish is too large, say where it exceeds 3,000 inhabitants (the figure is merely inserted to illustrate my argument, not because I see any special merit in fixing an arbitrary figure), let each parish *quoad sacra* be also taken as an administrative unit. "We must as little as possible disturb, we must as much as possible utilize," says Mr. Rathbone (p. 102), "existing arrangements, habits, and interests; we must prefer that primary area which is best suited to the most important administrative purposes; and, for both reasons, we must adopt some area already existing in every part of the kingdom." The idea of parish government is familiar to every Scotsman; the creation of parishes *quoad sacra* is also familiar. Further, there is, as I have mentioned above, no unit in all Scotland such as Mr. Rathbone adopts as the English unit. Perforce, therefore, if we do not adopt a new nomenclature altogether, the parish, old or new, must be a unit in Scots local government.

But what of Police Burghs? They could not be expected to relinquish their statutory powers, administered by a board of their own citizens, in favour of a Parish Board. This difficulty is met by extending the boundaries of all existing Burghs, Police or otherwise (not being within ten miles of a city of over 100,000 inhabitants), to the limits of the parish or parishes in which such Burgh stands, and making it a condition of the erection of all future Burghs that they should embrace the entire area of the parish or administrative area in which the "populous place" stands; the Burgh would have a special committee for its landward portion. We would thus have a duplex form of primary

government, but it would be impossible for any person to live under more than one form of government in one place ; and in the event of his owning property both in a rural or landward parish and in a burghal parish, his qualification, his duties, his days for electing representatives would be the same. The objection that a landward parish would be unable of itself to maintain a full sanitary staff is met by allowing the sanitary officer of one parish to be also sanitary officer of another, under such conditions as to salary, duties, &c., as might be arranged either by the respective parishes, or by the county government, or by the Act constituting the new local governments. Should property have any representation on a Parish Board apart from the election of its owners? I think not. The services of some good administrators may in the first instance be lost by the abandonment of a property qualification ; but it will sooner or later be seen, on the one hand by proprietors, that it is their duty to recognise the responsibilities of their position, and take their fair share of parish work ; and on the other hand by the voters, that ownership of property is a recommendation, and not an implied disqualification, for candidates seeking to serve the interests of the community. The prejudice of the voter is strong at present against the landed proprietor. Only just appreciation of each other's duties and obligations will bring about the harmony which all desire to see reigning in every relation of public as of private life.

The second area of authority must needs be the County. But not necessarily the county as at present known. Great cities must be specially dealt with. They cannot continue, even partially, under the rule of county gentlemen. There is already the example of Edinburgh, which, of itself, forms the county of the city of Edinburgh, with a separate lieutenancy. In the like way, other cities with a population exceeding 100,000 might be declared counties of cities. I

have already referred to the growth of small Police Burghs around such a city as Glasgow. These Burghs would remain, though not necessarily, with all their present functions, as primary units of Government, like parishes, but would form part of the county of such a city, just as landward parishes would form parts of a county.

Where the county is too large to be a convenient form of secondary authority, it should be divided. The county of Lanark, as above mentioned, forms at present for assessment purposes three distinct counties—the counties of the Upper, Middle, and Lower Wards. The same nomenclature can easily be used for the division of other counties, or the counties might be known as North, South, East, or West Lanarkshire. Each county in this case would consist of a group of landward parishes, or of Burghs co-extensive with, and taking the place of, parishes: and, in the case of counties of cities, of the various Burghs within its county's boundaries. It is quite as desirable that, for certain purposes, large cities should be broken up, as it is for others that all local authorities in and about a great city should be merged in a central County Council. The author of *The Radical Programme* (1885), suggested that the division of electoral districts should be the unit of Local Government. It cannot be so in the counties, but it might well be in large cities like Edinburgh and Glasgow.

The members of landward parish boards should be elected on the same qualification and on the same day as the members of Burgh Boards. These landward and Burgh Boards would delegate a fixed number of representatives to the County Board. Thus, in each year, there would only be *one* election. Members would be elected for a term of three years to the Parish Board, one-third of the Board retiring annually but being eligible for re-election; but the members of the County Board would be elected annually. No doubt it may be urged that many persons willing to

act on a County Board would not be willing to act on a Parish Board ; but if a separate election were annually held for representatives to the County Board, two objections would at once present themselves—(1) The system of representation would become complicated by double nominations and double voting ; (2) the *prestige* of the Parish Board would be lowered. It is fundamentally necessary that the Parish Board should be regarded as the stepping-stone to higher things ; and, as a general principle, no one should at any rate be qualified for office on the higher administrative board without practical knowledge of the working of the primary board. One exception, of course, must be made : the acting Sheriffs in each county should be *ex officio* members of each County Board. The whole functions of the Commissioners of Supply and Road Trustees would be vested in the County Board, who would be the only assessing *county* authority for all purposes. The following table gives in outline what might be the functions of the Parish and County Boards :—

SUBJECT OF ADMINISTRATION.	PRESENT GOVERNING BODY.	PROPOSED GOVERNING BODY.
Poor relief, Sanitary,	Parochial Board. Town Council, Police Com- missioners, or Parochial Board.	Parish Board. " "
School Board,	School Board.	" "
Registration of Births, &c.,	Parochial Board or Town Council.	" "
Burial,	Heritors, or Parochial Board, or Town Council.	" "
Court Houses,	Court Houses Commissioners.	County Council.
Roads and Bridges,	County Road Trustees.	" "
Lunacy,	District Boards of Lunacy.	" "
Prisons,	Prison Commissioners and Secretary for Scotland [See 40 and 41 Vic., c. 53].	" "
Spirit, Theatre, &c., licences,	Justices of Peace.	" "

SUBJECT OF ADMINISTRATION.	PRESENT GOVERNING BODY.	PROPOSED GOVERNING BODY.
Allotments and work- men's houses,		County Council.
Police, Lighting, Water Supply, &c.,	Commissioners of Supply or Commissioners of Police ; or Town Council ; or Parochial Board, as Local Authority for Special Water Supply District under Public Health Act, 1867.	" "
Registration of Voters,	Commissioners of Supply or Town Council.	" "

In each case where a Burgh formed part of a parish and existed in a county, special committee of Parish and County Boards to be appointed.

But one other question can here be considered. Should there be a National Council over and above the Parish or Burgh Board and County Council? Is it possible to make the County Councils directly communicate with the Crown? I am afraid not. Even if the counties were left as sovereign in their separate administrations, they would almost certainly form a voluntary union for consultation. Besides, a Board of Supervision for Lunacy and a central Scottish Education Department must still remain. These boards might well be merged in a Convention of Counties, consisting of the State Officers of Scotland, one or two representatives of each County Board, and the Judges. A similar Convention—the Convention of Royal Burghs—has existed since 1487, and from the memorandum on Local Government of the Assessor for the Royal Burgh of Lanark (Mr. Richard Vary Campbell, late Crown Advocate-Depute) I take the following suggestions, in which I entirely concur, as to the possible functions of a General County Convention:—

1. To consult as to all matters of local administration, and to pass bye-laws for the regulation of the proceedings of municipalities, and for the execution of the statutory and common law duties imposed upon them.

2. To settle the bounds of different municipalities, and where proper to annex or join one to another, regard always being had to keeping the divisions of the electorate, so far as may be, the same for both local and imperial purposes.

3. To supervise local management, particularly as regards the borrowing powers of municipalities, and to act as a court of audit or appeal over municipal accounts.

4. To undertake all the administrative work presently left to the Sheriffs as regards creation of Public Burghs, the marking out of districts under the Public Health Act, and the like.

5. To take over all the work of the Fishery Board, the Northern Lights Commissioners, the Board of Supervision, the Lunacy Board, the Register House, and any other boards or institutions of Local Government in Scotland, without prejudice to the continuance of the paid permanent staff of these boards, as at present, but their official premises to be in all cases in Scotland.

6. To grant compulsory powers necessary for any local schemes in Scotland, as for railways, gas, water, tramways, electric lighting, or others; all private or local and personal bills affecting Scotland being remitted by Parliament for inquiry and report to be made by the Convention acting by specially constituted committees as after-mentioned.

7. To discuss and to submit to the Secretary for Scotland resolutions and projects of legislation on the municipal or national business of Scotland, which he shall be bound to submit to Parliament in proper form, or to assign his reasons thereagainst to the Convention.

8. To receive and administer all such grants as are in use to be made for the Scottish affairs above-mentioned out of Imperial funds, and that under such regulations as may be imposed by Parliament or the Treasury; or to collect and administer such items of Imperial taxation as may be assigned for the Scottish affairs above-mentioned, under the like regulations by Parliament or the Treasury; and to impose such limited municipal assessment as has been usually made by the Convention, and as may be necessary to meet the expenses and purposes of the Convention.

9. To act by Committees in all such matters as may be appointed by the Convention, and in particular as regards powers 4, 5, and 6, these particular Committees being constituted with due regard to the legal or other functions to be discharged by them, and to efficiency and continuity of management, and in such manner as may be approved by the Secretary for Scotland.

WILLIAM GEORGE BLACK.

[* * With regard to Mr. R. Vary Campbell's suggestions, here adopted by our contributor as expressing his personal views, we desire to guard this *Review* from being held as thereby concurring in the scheme, especially as to power 5, to which we object on various grounds, to be stated, we hope, in an early number.—ED.]

III.—NIEBUHR ON THE STATE OF IRELAND IN 1829.*

THE views deliberately formulated by so great a Historian as Niebuhr, on a subject so crucial at the present moment as the state of Ireland, cannot fail to be of the highest interest to the Jurist and Statesman of our own day.

The *Letter* to which we desire to draw the attention of our readers, was written by Professor Niebuhr in response to the earnest invitation of an old friend in England, Mr. Irving, who was in 1829 Member for Bramber, and who subsequently sat for County Antrim in the Reformed Parliament of 1832, and down to his death in 1845.

The invitation to speak his mind fully on two such grave subjects as Roman Catholic Emancipation and the State of Ireland was evidently felt by the Roman historian as a

* *A Letter upon the Roman Catholic Emancipation Question, and the State of Ireland in 1829.* By PROFESSOR NIEBUHR. London. Hatchards. 1887.

high honour, indeed he says that he looks upon it as "one of the most flattering distinctions" ever conferred upon him.

The qualifications of the eminent historian for the task thus imposed upon him consisted not so much in his mastery of the History of the Roman People, *rerum domini*—important as that factor might well be considered. They consisted rather in an aspect of Niebuhr's own history which is apt to be lost sight of through his very eminence in other aspects, viz., his intimate knowledge of the Politics of the Roman *Curia*, gained during the period of his residence in Rome as a Diplomatic agent.

It is this acquaintance, to which Niebuhr necessarily frankly confesses, with the Political side of the Papacy which gives an additional present importance to his views on the Irish question. For there are but few, if any, among our living Statesmen who have any practical acquaintance at all with the Roman *Curia*. To most of them Rome is a name, and nothing more. To Niebuhr it was much more: it was a living and energising Policy. And a living and energising Policy it is at this moment, though the actual movers and the mainsprings of that Policy may not be known to us.

It is peculiarly interesting to read how Niebuhr, had he been an Englishman, would have aspired to the honour of a seat in the House of Commons. Whether this honour would now-a-days have seemed to him so desirable, may however be doubted, since he confesses that it would have been "deeply painful" to him to admit "one of the stamp of O'Connell and Sheil" to a place in that assembly. What he would have had to say of some who now sit there it can scarcely be difficult to imagine, considering that even to him, a foreigner, the admission of the two whom he names is "like a disparagement and a stain to Parliament."

Very seriously does the great historian put before us a view which may give rise to much reflection on our

part, that "there is a peculiar fatality attached to the relations between Great Britain and Ireland, at least for upwards of two centuries, that Britain has always neglected the moment to make beneficial concessions to the country which she cannot suffer to remain separate and independent at the moment when she could limit those concessions, within boundaries suitable to her interests."

That Great Britain "cannot suffer Ireland to remain separate and independent," Niebuhr clearly saw. That the right time for necessary concessions to Ireland has too often been lost, may well be admitted by us with deep regret. Let us hope that we shall not again be chargeable with acting with an "unaccountable" want of foresight, in times which are most certainly, as regards Ireland, "times of anxiety and apprehension."

It is not a little significant, in view of the propositions that have been in the air on the subject of late, that Niebuhr should not only foreshadow the possible separation of Ulster from the rest of Ireland, but that he should even regard it as a Political blunder on the part of James I. not to have annexed that Province to Scotland at the time of the Plantation.

Whether Niebuhr's plan of having what would virtually have been three Irelands recognised, a Scottish, an English, and an Irish Ireland, if we may so speak, would have avoided our present difficulties, it is not easy to say. It might possibly have intensified the existing antagonisms, hard as it may be to conceive of their being intensified. Probably, however, Ulster and the English Pale would have coalesced, for all practical purposes, and then what Niebuhr calls the "barbarous part of the island" would have been in a minority of one.

On the separate Irish Parliament of James I., Niebuhr is very severe. But it is at least as possible that the creation of such a Parliament, which was no doubt soon

tempted, as it was likely to be tempted, to "consider itself as equal to that of England," was a concession to the notions of his English subjects, as that it was looked upon by James in the light of a "toy" with which "he and his successors might safely amuse themselves." We doubt whether Parliament ever really was sufficiently amusing to James for him to have looked upon it in the light of a "toy." We are inclined to think that "*bore*" would better express his view.

That the Union with Ireland would bring about sooner or later a majority of Roman Catholics among the Irish representatives, Niebuhr clearly saw as the result of a soon to be preponderating Roman Catholic Electorate. The Irish Peerage he would apparently have practically incorporated with the Peerage of Great Britain. At least, we take it that this must be the meaning of the sentence in which he says that he would "add the whole of the present Irish Peers to the number of the Representative Peers instituted by the Union." He seems also to have advocated an indefinite extension of the Irish Peerage in the subsequent portion of the same sentence, in which he writes "so that they might be carried by new nominations to any number; that there never should be less Catholic Peers returned than those actually existing, more there might." It is perhaps not certain that Niebuhr here meant anything more than to suggest that the number of the Roman Catholic Peers of Ireland should not be suffered to diminish, but should rather be increased.

The "main difficulty" that Niebuhr foresaw consisted in the question of the nomination of the Bishops. This has been felt to be a grave difficulty on the Continent, and perhaps it has not yet received its true solution in any country where the State has a large or a preponderating Roman Catholic element to deal with. The one mode which Niebuhr

thought the "most dangerous way," that of election by the Chapters, is, of course, the Canonical mode. But, under the existing system of sending up three names to Rome, it comes to being practically equivalent to a nomination by Rome. And yet it is obvious that the Holy See cannot,—or at least does not—control the Bishops—witness the case of Belgium no less than the case of Ireland. Nomination by the Crown was, in Niebuhr's eyes, clearly impossible. A right of veto by means of a Secret Treaty was the best alternative that suggested itself to him. But judging by the want of success of Secret Missions of late years, it may be seriously doubted whether a Secret Treaty would have procured us any advantages, and the other suggestion of a Nominating Commission of Bishops and Peers is certainly not a very Ecclesiastical arrangement.

That direct negotiation with Rome might have been of value at the time when Niebuhr wrote may be admitted, but it would have required the sagacity of a Niebuhr,—and it appears from his own words that we might have had that for the asking.

How great the value of the direct negotiation at Rome of a Niebuhr might have been for us, cannot perhaps now be estimated. The opportunity was irrevocably lost, and there is no use now in bewailing it. That direct negotiations are either needed now, or likely to be useful under all the altered circumstances, we do not ourselves believe. Others may still be of a different opinion.

One curious little point is noticed by Niebuhr, and it is characteristic of his thorough acquaintance with the system of the *Curia*. In the case of a country which is known as one of the "countries of mission"—that is to say, as he explains, where the Roman Catholic Church is not established by Bishops "publicly recognised,"—in other words, where a Hierarchy has not been set up,—in "Matrimonial Dispensa-

tions on account of affinity, . . . no fees are paid for Dispensations, which the Penitentiary grants instead of the Datary." Down to the period of Emancipation, this was, as Niebuhr believed, the practice with regard to the United Kingdom; but, he continues, "if one may judge from other instances, as soon as there will be a regularly-established [*i.e.*, of course, a Hierarchically organised] Catholic Church the extortion of the Datary will begin."

Since Niebuhr wrote, both England and Scotland have ceased to be "countries of mission." It may be presumed, therefore, that the Apostolic Datary has something, and indeed a good deal, to say in the matter of English and Scottish Matrimonial Dispensations.

That Roman Catholic Emancipation would "not restore peace and satisfaction to Ireland," and that "the bulk of the population" would "not be less miserable for it," Niebuhr clearly saw. Events have but proved his Political clear-sightedness.

The great historian ends, as he had almost begun, with a suggestion that any services which he could render in the then serious crisis were at the disposal of the British Government. Although those services were not, as far as we know, in any way, or at least in any adequate way, made use of, we cannot but feel that Niebuhr has rendered us a greater service even than that which he offered in 1829. For he has left on record, and his old friend's representative has placed in our hands, the weighty expression of his deliberately-formed opinions on one of the most momentous questions of his own as of the present day—the State of Ireland. We can only hope that the publication of Professor Niebuhr's *Letter* will itself be *auspiciū melioris ævi*.

IV.—THE POSTPONED LAND TRANSFER BILL.

EVEN as the pen is dipped for the purpose of writing these remarks, the Rt. Hon. W. H. Smith announces in the House of Commons that sufficient time cannot be given to secure the passing of the Land Transfer Bill; words which must be taken to mean that the Government, for want of time, have determined to postpone the Bill to the next Session. This decision brings a sense of relief to those who prefer the delay of some (possibly desirable) reforms, to the passing of a measure likely to lead to much litigation. The Bill contains numerous passages which are rendered obscure either by patent ambiguity of language or by that latent ambiguity which proceeds from apparent inconsistency with justice, common sense, or presumable intention. Passing from clause to clause it is easy to collect a budget of doubts and queries. The object of the present paper is to lay these in order before the readers of the *Law Magazine and Review*, in the hope that some of them may be able to exert a beneficial influence before the Parliament, so soon to be adjourned, shall meet again. It must be understood that these observations are intended to deal solely with the outward form in which the Bill appears; its principles, and all questions as to the wisdom of its several provisions, are left for other hands; or, at least, their consideration is put off to a future time. Some corrections have already been made since the Bill was first printed; the errors (or supposed errors) which will be mentioned here are only those which remain in the Bill as "ordered to be printed, 7th July, 1887."

Commencing with the *Title*, we have to note that a double error is involved in the words "Land Transfer Bill." Part IV. consists of a sweeping reform of the law of descent of Real Property, and has no connection

whatever with "Transfer." Moreover, the other "Parts" of the Bill deal extensively with Registration, a wide subject of which "Transfer" forms only a subordinate part.

The *Sub-Title* "Compulsory Registration."—This subtitle (Part II.) is ambiguous, as there is nothing in it to shew whether compulsory registration of land, or merely compulsory registration of transfer of land, is meant. Apart from this, it is misleading, for there are several of the clauses under it (*e.g.*, 4, 6, 8) which have no special reference to *compulsory* registration. A question also arises, whether there can be any "compulsory registration" otherwise than by a provision that there shall be no legal or *equitable* estate or interest without it. It seems quite possible that, if this Bill were to pass as it stands, the land-owner of the future might be content to rely on such equitable interest as he might have without registration, and "legal estate" might come to be treated as a mediæval myth. The fate of the Statute of Uses should serve as a warning.

Cl. 2, &c. ; Cl. 66.—"Land" is not defined either in the Bill or in the Principal Act.* A provision in the Principal Act, s. 4, to the effect that the definition in 13 & 14 *Vict.*, c. 21, is not to apply, seems intended to exclude buildings; but such exclusion would be at variance with the normal legal meaning of land, *v. Co. Litt.* [4a]; and it would involve the strange consequence that a sale by transfer on the Register of land with houses on it would cause the land to pass without the houses. Again, the contrasted use of "land" and "real estate" in the Bill (*e.g.*, in *Cl. 2* and *Cl. 39*), and the separate mention of "land" and incorporeal hereditaments in the Principal Act (*see s. 5, &c.*, and s. 82) seem to shew that "land" does not include

* *I.e.*, 38 & 39 *Vict.*, c. 87 (The Land Transfer Act, 1875): *v. Cl. 66.* The new Act is to be "construed as one with the principal Act," *cl. 67.*

incorporeal hereditaments. But, *per contra*, "settled land" is to have the same meaning as in the Settled Land Act, 1882 (*Cl.* 66), and "land," in that Act, includes incorporeal hereditaments (*see* that Act, s. 2 (3), (10) (i.)), whence it may be argued that "land" includes incorporeal hereditaments in the Bill also.

Cl. 2.—"operate only as a contract"—"right of enforcing the contract."—These words, as they stand, may be thought to give a right to enforce a conveyance, as a contract, even if there be not a valuable consideration. It is submitted that this cannot be intended, as it would be contrary to the ordinary rules of Equity.

Cl. 3 and elsewhere.—The "Court," from the context, seems to mean the "High Court;" the "High Court" means the High Court of Justice (*Cl.* 66); and proceedings in the "High Court" are to be in the Chancery Division (*Cl.* 65). But the "Court," under the principal Act, ss. 4, 114, means, under some circumstances, the County Court. The question arises whether the jurisdiction of the County Court is ousted or not.

Cl. 5 (6).—The expression "executors *proving the will*," taken literally, excludes executors of executors; but such persons have, in other respects, the same rights as original executors, and it seems unlikely that it is intended to exclude them.

Cl. 9.—This provides that no "legal estate or interest" capable of registration . . . in any registered land "or charge shall be conferred otherwise than by a disposition, completed by registration." Taken as it stands, this amounts to a provision that no man can have a right to be registered until he has been registered already. This, of course, would be nonsense; what is really meant can only be matter of conjecture.

Cl. 13 (6).—This sub-clause transfers to a new proprietor the rights, as to confirmation, of the former pro-

prietor, if the proprietorship change within the five years prescribed by sub-clause (1). But it makes no provision for change of proprietorship after the five years but before entry has been made on the Register. In such a case, therefore, the new proprietor will derive no benefit from what has been done by the former proprietor, an injustice which can scarcely have been intended.

Cl. 13 (2).—The words “with respect to its date” are perhaps intended to indicate that, while the statements in the affidavit on final application cannot be precisely the same as those in the affidavit made five years earlier, they are to be the same so far as the difference of time will allow; but it is submitted that the words are really unmeaning, and that the construction of this sub-clause must, therefore, be considered doubtful.

Cl. 21 (1).—This sub-clause seems to entitle a man, under certain circumstances, to compensation in respect of his own “forgery or fraud,” an anomaly which can scarcely have been intended.

Cl. 25 (1).—This provides, *inter alia*, that a registered charge on land shall “have effect as a conveyance by deed.” Such a provision (having regard to the definition of “conveyance” in the Conveyancing and Law of Property Act, 1881, imported into the Bill by *Cl. 66*) would put the chargee in the position of a mortgagee by deed under s. 19 of that Act, so that he would have a power of sale, &c.; but it would not make him a “statutory” mortgagee under s. 26 of that Act, so that there would be no implied covenant under that section for payment of the debt and interest. At the same time, s. 23 of the principal Act, which now imports such a covenant, would be repealed if the Bill were to pass (*see Cl. 69 and Sched. II*). It is submitted that it cannot have been intended thus to deprive a person lending money of one of the most ordinary provisions for his security.

Cl. 27 (2).—This sub-clause seems altogether vague, for there is nothing to shew by whom the “sums” must be “considered” to be “advances” in order to come within it; and, apart from that, the expression “by the course of business between the parties” is of the very widest description. It is conceivable that this provision might be so construed as to enable a borrower and a lender, by collusion, to do great injustice to a third party who might also have lent money to the former.

Cl. 31.—This clause is intended, presumably, to authorise the removal of the description, “an infant,” *when the proprietor comes of age*; but it is not so limited by any express words, and it therefore gives an arbitrary power of removing such description. It is submitted that this cannot have been intended.

Cl. 38 (1).—The words “to the heirs of his ancestor” are good as far as they go, and have been inserted, obviously, to prevent the property from being diverted from the personal representatives by the necessity of tracing descent from a “purchaser” who may have died before the commencement of the Act. But it must be remembered that the “purchaser,” instead of being a progenitor, may be a collateral relative, *e.g.*, a brother; and although the word “ancestor” might possibly, with reference to descent of land, be held to include such a relative, the question would probably be considered open to argument. There is, therefore, an ambiguity which might frustrate the presumable intention of the Legislature.

Cl. 39 (1.) (a) (b), (2.) (b) (c), and subsequent Proviso.—A., a man married before the passing of the new Act, becomes, by the birth of a child, tenant by the curtesy initiate. Under the existing law he can sell the estate for his own life; and, if he becomes bankrupt, it goes to his creditors. But, under this proviso, A. has an option to take all his wife’s real estate for his life, instead of curtesy.

How and when must the option be made, so as to prevent a conflict of rights between the purchaser or creditors on the one hand, and the husband and the wife's heir on the other? A similar question, *mutatis mutandis*, arises as to dower.

Cl. 39 (1.) (a) (b).—A doubt may arise whether the right here given to surviving husband or wife is of the nature of a settlement, so as to come within 22 & 23 *Vict.*, c. 61, s. 5, and 41 *Vict.*, c. 19, s. 3, which give the Court power over a settlement in case of dissolution of marriage, &c. A similar doubt, *mutatis mutandis*, may arise as to 4 *Geo. IV.*, c. 76, s. 23, and 19 & 20 *Vict.*, c. 119, s. 19, which enable the Court to deprive persons of property obtained by a fraudulent marriage.

Cl. 41 (1.).—The provision involved in the words “save “as otherwise directed by the Court,” seems unworkable as it stands, for the matter is not before any Court, and there is no direction as to the form or manner in which it may be brought before it.

Cl. 43.—“Legacy duty” has no technical meaning, and the words do not, literally, include duty on intestacy. When the Legislature desired to include both duties in one category, it described them as duties on “legacies and “shares of personal estate under the Legacy Duty Acts,” *v. Succession Duty Act*, 1853, s. 18. It is probable that the clause under observation is intended to include both, but the point may be disputed. The same remarks, *mutatis mutandis*, apply to “probate duty” and administration duty, which have been described in the aggregate as duties on “probates of wills and letters of administration,” *v. 55 Geo. III.*, c. 184, *Schedule, Part the Third*.

Part VI., Sub-title, “Land Transfer Board.”—This sub-title is deceptive, as here applied, for it is equally applicable to Part I.

Cl. 52 (3.).—This sub-clause is probably intended to enable the Land Transfer Board (or local office) to authen-

ticate its own instruments and office copies thereof, or, at the most, copies of instruments, generally, which it has verified with the originals. As it stands, it seems to give unlimited discretion to make any copy whatever, for the purposes of evidence, equivalent to an original, and it is submitted that it cannot have been intended to create so dangerous a power.

Cl. 62 (3.).—The words “deceased person” are ambiguous, as they may mean either a person already deceased at the time of passing or making the Act, deed, &c., or a person living at that time, but who has died afterwards.

Cl. 66, 67.—As to the word “land,” *v. supra*, *Cl. 2*, &c. The definition of “Land Transfer Acts” in *Cl. 66*, viz., “The principal Act as amended by this Act,” may cause perplexity, as it may be argued that they are intended to exclude so much of the new Act as does not relate to the subject matter of the principal Act and cannot therefore be said to amend it (*e.g.*, the whole of Part IV.). Apart from this, there is a species of contradiction between this definition and the provision, in *Cl. 67*, that the principal Act and “This Act” “may be cited together as the Land Transfer Acts, 1875 and 1887.”

Cl. 69 & Sched. II.—The unqualified repeal of so much of the principal Act, section 11, “as relates to a person who has contracted to buy,” taken as it stands, repeals the whole of sub-section (1.) on which alone we have to depend for a definition of leasehold land within the meaning of the Land Transfer Acts. The definition is rather peculiar, as it includes some kinds of property which are really freehold, and excludes some which are really leasehold; it is not likely, therefore, that it was intended to alter it thus by a species of side wind.

It may perhaps be objected that some of the points above mentioned are open to little doubt, and might, therefore, in popular phrase, be “left to take care of themselves.” But such reasoning does not commend itself to those who have

watched the uncertainties of Judicial interpretation. On matters of principle, the opinions of able men may sometimes differ; on questions of Construction, there is almost always a difference of opinion if a chance is offered. And, when the ball is once thrown down it is impossible to predict how far it may roll. The contested question under s. 5 of the Married Women's Property Act, 1882, has already been described in the pages of this *Review*,* but it points an appropriate moral, and is quite worth mentioning again. On that question, which related to conflicting claims of husband and wife, there were five decisions in favour of the wife and three in favour of the husband; while, stranger still, the three Judges who decided in favour of the husband had all previously decided in favour of the wife. The Court of Appeal has settled the matter for the present in the husband's favour, but the House of Lords may some day settle it finally against him. In any case, as a learned Q.C. observed in consultation, "there are three or four persons walking about with other people's money in their pockets." When, in addition to the stream of gold thus diverted from its proper channel, it is considered how much more must have been poured out in fees for opinions given and briefs held, no further argument is required to shew how considerable is the stake of the public in the careful and correct wording of an Act of Parliament. Between the present date and the commencement of the next session, there will be ample time both for reflection and for work; and it may be hoped that the opportunity for revision, which the chances of the Parliamentary campaign have afforded, will not be neglected by those who are in any way responsible for the postponed Land Transfer Bill.

ALMARIC RUMSEY.

[* *Law Magazine and Review*, No. CCLIX., for February, 1886. Art.—*Conflicting Judicial Views on the Married Women's Property Act, 1882.*—Ed.]

V.—FOREIGN MARITIME LAWS: ITALY.

IT has been found practically impossible to carry out, with regard to Book IV., the system of cross notation to other Codes, and it is felt that, even if carried out, it would have caused more disappointment than satisfaction to anyone using the translation, and this for the reason that the present is the first Code which has attempted to lay down in consecutive order a course of Procedure in Maritime matters. In Belgium, as noted at the end of the translation of the Belgian Code, a considerable portion of the Law has been relegated to the Code of Civil Procedure, pending the reform of that Code; but numerous provisions can only be picked out of what we should call the Statute Book, and references to that would be about as edifying to the English reader as references to our "*Merchant Shipping Act, 1854, and the Acts amending the same*" would be to the foreigner, to say nothing of the strong probability that in the course of the next year the whole may be codified, which would render all the references wrong and misleading. The same remark applies to France, except that the prospect of a new Code of Civil Procedure is less likely to be realised there owing to the disturbed condition of Politics in that country. Spain has just succeeded in producing a new Code of Commerce, in which part of the Procedure is to be found, while the rest remains in endless *Revistas* and *Nuevas Revistas*, and *Nuevissimas Revistas*, by which, in the course of the last thirty years or so, jurisdiction has been given to, and taken away from, Commercial Tribunals. In Germany, much depends on the local State Law, whilst other matters are governed by the Code of Commerce. Again, in the Scandinavian States (Sweden,

Norway, and Denmark), an attempt is in progress to assimilate the Procedure of those States in Maritime matters. It has, therefore, been thought best, in the interests of the reader, as well as of any person who hereafter may have to verify the cross-references, not to cumber this article with them, but simply to give a translation of those articles which affect Ships.

CODE OF COMMERCE [ITALY].

BOOK IV.

Of the Prosecution of Commercial Actions and of their Duration.

TITLE I.

Of the Prosecution of Commercial Actions.

CHAPTER I.

General Provisions.

ART. 868. The prosecution [*esercizio*] of Commercial Actions is regulated by the Code of Civil Procedure, saving the provisions of the present Code.

869. The Commercial Jurisdiction has cognisance of:—

- (1.) All disputes relating to commercial affairs [*atti di commercio*] between all sorts of persons.
- (2.) Actions to annul or confirm the arrest [*sequestro*] of a ship, although it was obtained for non-commercial debts.
- (3.) Actions against captains of ships, agents [*istitutori*], or representatives, commercial travellers [*commessi viaggiatori*], and brokers [*commessi di negozio*], arising out of the business they undertake; and actions relating to these persons against their principals within the same limits.
- (4.) Actions by a passenger against the captain or charterer [*armatore*], and by a captain or charterer against a passenger.

[(5.), (6.), (7.), (8.), are omitted here, as not relating to Maritime concerns.]

If the dispute includes a question of inheritance, the cause is sent to the proper Civil Court to decide the question, saving the cognisance of the merits of the case to the Commercial jurisdiction.

870. If the offence [*atto*] is one of trade [*commerciale*] for only one of the parties, actions arising out of it are within the Commercial jurisdiction.

871. In case of Commercial disputes arising during fair [*fiera*] or market [*mercato*] times, for which it is necessary to provide without delay, the Prætor of the place, even if the cause is one which he is not competent to decide, may make suitable *interim* orders, and remit the parties to the proper Court.

Such orders may be made likewise by the public umpire [*conciliatore*] of the Commune in which the fair or market is held, if the Prætor is not resident there.

872. Personal actions and actions *in rem* [*reali*] against chattels [*beni mobili*], arising out of business undertaken on account of a national or foreign company by its agent [*istitutore*] or representative elsewhere than in its own place of business [*sede sociale*], may be proceeded with by third parties either before the Judicial Authority of the place where the business is carried on, or of that where the agent or representative resides.

Actions arising out of a contract of carriage [*trasporto*] may be proceeded with before the Judicial Authority of the place where a representative of the carrier [*vettore*] resides, and, if the matter relates to railways, before the Judicial Authority of the place either of departure or arrival. In this matter the provisions of Article 375 * are applicable to the station master.

873. Actions which arise from the collision [*urto*] of ships may be proceeded with before the Judicial Authority either

* Article 375 allows a superintendent, in certain cases to sue and be sued for his employer.

of the place where the casualty occurred, or of the first place at which the vessel puts in, or of her destination, saving the provision of Art. 14, Clause A.,* of the Mercantile Marine Code.

874. A plea [*eccezione*] to the competence of the Commercial Jurisdiction on the ground that the cause is Civil, and to that of the Civil Jurisdiction on the ground of the cause being Commercial, may be put forward in any state or at any stage of the proceedings, and the Judicial Authority must declare itself *functus officio* [*d'ufficio*].

Nevertheless, when the Judicial Authority that is called upon (to decide the case) exercises both the Commercial and Civil Jurisdiction, an omission or mistake in indicating one or the other cannot cause a declaration of want of Jurisdiction [*incompetenza*].

875. When in a Commercial cause the parties are sent before the Civil Tribunal on a question of *falsification* † [*falso*], or on a question of succession, in accordance with the provisions of Art. 406 of the Code of Civil Procedure, or of the last clause of Art. 869 of the present Code, the Commercial Judicial Authority may, even before that question is decided, make such provisional and temporary orders as are desirable.

876. In all Commercial causes, the time [*termine*] for taking steps is regulated by the provisions of Art. 147 ‡ of

* ART. 14, M. M. C. The Captains of the Port of a district in which the Capital of a Department is situated, and the Officials of the Port in their respective districts, decide disputes where the claim does not exceed 400 lire [francs], in the following cases:—

(A) For damages caused by collision between vessels, or in anchoring, or mooring, or in transacting any manœuvre within the harbour, docks, or approaches of the districts.

† If, that is, a person denies a signature purporting to be his, to be in fact his.

‡ A translation of the Articles of the Code of Civil Procedure referred to will be found at the termination of the series of *Foreign Maritime Laws: Italy*.

the Code of Civil Procedure, and may be reduced in accordance with the subsequent Art. 154.

In such causes, the proceedings are summary [*sommario*] even before the Courts, saving the faculty allowed by Art. 413 of the same Code.

877. In Commercial Judgments, although kept alive [*continuati*] by formal proceedings, the period for setting aside [*perenzione*] proceedings stated in the first part of Art. 338, and in Arts. 447 and 464 of the Code of Civil Procedure is reduced by one-half.

878. In Commercial cases (instead of a payment into Court) a Judicial deposit [*deposito giudiziario*] may be made of a sum of money, by consent of the parties, in any public credit establishment [*istituto di credito*], or even with a private banker [*privato banchiere*].

CHAPTER II.

The Arrest [sequestro], Attachment [pignoramento], and Sale of Ships by the Court.

879. Every creditor has a right to proceed to arrest or attach, and to sell a ship, or an undivided share thereof, which belongs to his debtor, on carrying out the formalities hereinafter stated.

Privileged Creditors can exercise this right, even if the vessel subject [*vincolata*] in whole or in part to their claim has passed into the hands of a third party.

880. A vessel may be arrested in the cases, and adhering to the formalities, laid down by Art. 921, and those following it, in the Code of Civil Procedure.

On an arrest being declared valid by the proper Tribunal of Commerce, the sale, marshalling [*graduazione*] of creditors, and apportionment [*distribuzione*] of the proceeds are carried out in conformity with the rules laid down in the present Chapter.

881. A ship when ready to sail is not subject to arrest or attachment.

A ship is deemed to be "ready to sail" [*pronta a partire*] when the Captain has got his ship's papers [*carte di navigazione*] for the voyage.

882. At any stage of the proceedings, the Tribunal before which the cause is pending may, at the request of a creditor who has a privilege on the ship, or of a co-owner of the ship, or even of the debtor himself, order the vessel to undertake one or more voyages, prescribing such safeguards [*cautele*] as seem to the Court suitable to the circumstances.

The voyage cannot be commenced until the order is entered in the registry of the Marine Administration and noted on the ship's register [*atto di nazionalità*]. The disbursements necessary for the voyage must be advanced by the person requiring it to be made. The amount of freight [*nolo*], less disbursements, is added to the price realised by the sale.

883. In the order [*precetto*] for proceeding against [*esecuzione*] a ship or a share in a ship, notice must be given to the debtor to pay the amount due within 24 hours, and a warning that if not paid within this time the vessel will be attached. [Cf. *Code of Civ. Proc.*, Arts. 562, 577.]

If there is any danger of the vessel being removed [*sottrazione*], the Prætor may authorise an immediate attachment in the manner laid down in the Code of Civil Procedure, Art. 578.

884. The order [*precetto*] must contain an address for service [*elezione del domicilio*] in the Commune where the Tribunal before which the proceedings are carried on sits, stating the name of the person at whose house it is given [*con indicazione della persona presso la quale il domicilio è eletto*]. [Cf. *Code of Civ. Proc.*, Art. 563.]

The order must be served on the owner in person, if the

action arises out of an ordinary [*generale*] claim against him ; it may be served on the Captain if the debt is one of those which confer a privilege [*credito privilegiato*] against the ship [*sulla nave*].

An order becomes of no effect [*inefficace*] if 30 days have elapsed without further proceedings being taken. If there is any defence [*opposizione*] this time runs from the notice of a judgment which determines the question which has arisen, or from the day on which the defence has been set aside [*perentia*]. [Cf. *Code of Civ. Proc.*, Art. 566.]

885. The officer of the Court [*Usciere*] must set out [*enunciare*] in the formal statement [*processo verbale*] of the attachment, in addition to that which is prescribed by Art. 597 of the Code of Civil Procedure :—

- (1.) An address for service, or declaration of a domicile or residence within the Commune where the Tribunal before which the proceedings for the sale of the ship are carried on sits, and in the place where the vessel which is attached is lying at anchor [Cf. *Code of Civ. Proc.*, Art. 570].
- (2.) The name and surname, domicile or residence of the shipowner and of the captain.
- (3.) The name, description [*specie*] and burthen [*portata*] of the ship.
- (4.) A list of the skiffs [*schifi*], boats [*scialuppe*], apparel [*attrezzi*], and furniture [*arredi*], stores [*armi*], implements [*munizioni*], and provisions [*provviste*].

The officer of the Court must appoint a watchman [*custode*] to the ship attached, who must sign the formal statement of the arrest.

886. If the owner of the ship which is attached resides or is living in the Commune in which the proceedings for the attachment are taken, the creditor who is taking proceedings must, within three days, serve him with a copy of the formal statement of the arrest and summon him before

the Civil Tribunal of the place where the proceedings are carried on, in order to the carrying out of the sale of the things which are attached.

If the owner has no residence [*residenza*] or dwelling house [*dimora*] within such Commune, the notices and summonses are served personally on the captain of the ship which is attached, and in his absence on the person who for the time being represents the owner or the Captain.

If the owner is a foreigner [*straniero*] and has no residence or dwelling house within the Realm, notices must be served in the manner prescribed in Arts. 141 and 142 of the Code of Civil Procedure.

Another copy of the formal statement of arrest must be lodged by the officer of the Court in the office in which the vessel is registered [*inscritta*].

887. The Tribunal which gives authority for the sale must lay down the conditions on which it is to take place, and remit the parties to the Judge to whom the matter is assigned [*giudice delegato*], to fix a day for the sale [*incanto*] and for the other operations necessarily incident thereto.

The Tribunal must also give orders to the Registrar [*cancelliere*] to advertise the sale [*formare il bando*].

888. The attachment becomes void [*perento di diritto*], and the attaching creditor liable for the expenses of it, if the sale does not take place within the next 40 days. The time occupied in defending the action, as shewn in Art. 884, is not included in this period. [Cf. *Code of Civ. Proc.*, Art. 581.]

889. The advertisement [*bando*] must state:—

- (1.) The name and surname, profession and residence, domicile and dwelling place of the creditor who is taking the proceedings [*creditore istante*].
- (2.) The nature of the claim [*titoli*] in respect of which he is proceeding.
- (3.) The amount due.

- (4.) The address for service of the creditor taking proceedings in the Commune where the Tribunal before which he is proceeding sits, and in the place where the vessel is lying at anchor.
- (5.) The name and surname, residence, domicile or dwelling of the owner of the ship which is attached.
- (6.) The name, description, and burthen of the vessel, whether it is fitted [*armata*] out or fitting out [*in armamento*], and the name and surname of the Captain.
- (7.) The place where the vessel is lying [*giacente*] or floating [*galleggiante*].
- (8.) The skiffs, boats, apparel and furniture, stores [*armi*], implements [*munizioni*], and provisions included in the sale.
- (9.) The name and surname of the proceeding creditor's solicitor [*procuratore*].
- (10.) The conditions of sale.
- (11.) The times [*udienza*] fixed for receiving bids [*incanto*].

890. The advertisement is published by being posted up [*affissione*]:—

- (1.) On the mainmast [*albero maestro*] of the attached ship.
- (2.) On the principal entrance of the Court House where the Tribunal, before which the proceedings for sale are taken, sits.
- (3.) In the principal open space [*piazza principale*] and on the pier [*molo*] or quay [*scalo*] of the port in which the vessel is lying at anchor, and in the Custom House of the place.
- (4.) In the rooms of the Exchange [*sale di borsa*] and Chamber of Commerce.

A *précis* [*estratto sommario*] of the advertisement must be inserted in the newspaper which contains the legal notices

[*giornale degli annunci giudiziarii*] three days before the sale.

The advertisement must also be notified :—

- (1.) To the debtor or to the Captain in the cases for which provision is made in Art. 510.
- (2.) To the person appointed as watchman [*custode*] by the officer of Court.
- (3.) To the privileged creditors mentioned on the ship's register, or on the register of the office in which the vessel is registered, and to any other creditor, although not a privileged one, who has in writing formally given notice [*con atto notificato*] to the proceeding creditor of his intention to intervene in the proceedings.

891. If the attachment is on a vessel of more than thirty tons burthen, the placard [*bando*] must be published, and a *précis* inserted in the newspaper containing legal notices three times consecutively, from week to week. After the placard has been published the first time the Judge to whom the proceedings for sale are assigned receives bids [*offerte*] through the registry [*cancelleria*].

After the placard has been published the third time, the auction [*incanto*] is opened in the presence of the Judge to whom the matter is assigned [*giudice delegato*] at the time fixed, and the sale is made to the person who is the highest bidder [*maggior offerente*], at the time when a previously unused candle goes out [*ad estinzione di una candela vergine*], without any other formality.

892. The Judge to whom the matter is assigned may, for sufficiently strong reason [*per gravi motivi*] allow and even officially [*d'ufficio*] order one or two stays of proceedings [*dilazioni*] of a week each.

These stays are notified by public advertisements [*avvisi*] and postings up in the manner prescribed above.

893. Anyone [*ognuno*] may bid at the auction.

A person who bids on behalf of some one else must produce a special authority [*mandato*] and attach it to his tender [*atti*].

Only solicitors [*procuratori*] lawfully practising before the Tribunal may bid at the auction on behalf of an undisclosed principal [*persona da dichiararsi*].

Every bidder must deposit in cash [*danaro*] in the registry the approximate amount of the expenses of the auction and of the sale, and of paying off the amount of the debt [*trascrizione*] mentioned in the public notices.

He must also deposit in cash or in State Funds [*titoli del debito pubblico dello Stato*] at the current rate of exchange [*valore di borsa*] payable to bearer, one-tenth of the price at which the biddings commence, unless the Judge, after hearing the creditors who are present, dispenses with it.

The parties who are obliged to make a deposit can do so either directly in the Treasury [*cassa dei depositi e prestiti*] of deposits and loans, or in the Post Office Savings Bank [*casse di risparmio Postali*], on handing the receipt to the Registrar [*cancelliere*].

A person who is outbidden [*vinta*] is entitled to the immediate return of the deposit he has made.

894. A formal statement is drawn up of everything that occurred during the auction, in which the person adjudged to be the highest bidder [*aggiudicatario*] must give an address for service in the Commune where the sale is effected; failing this, notices to him are properly served by being left in the Registry [*cancelleria*] of the Tribunal.

895. A solicitor [*procuratore*] who is adjudged purchaser [*aggiudicatario*] on behalf of an undisclosed principal [*persona da nominare*] must, within three days next following the auction deposit in the Registry a special authority [*mandato*] given before the sale, unless the person on whose behalf he has tendered prefers personally to adopt it by a declara-

tion received by the Registrar [*cancelliere*]; failing this, the bidder [*offerente*] is considered as having been adjudged purchaser in his own person.

896. The purchaser of the ship is bound to deposit the remainder of the purchase money within five days. In case of default in so doing, the vessel is put up to auction again at the risk and expense of the (first) purchaser, by order of the Judge to whom the matter is assigned. The re-sale [*rivendita*] takes place three days after a new and single public notice [*bando*]. The purchaser who has made default [*inadempiente*] is bound to pay the difference between the sale price to him and the re-sale, besides damages [*danni*] and expenses, out of the deposit he has made. [Cf. *Code of Civ. Proc.*, Arts. 634, 689.]

If, before the re-sale takes place, the original purchaser [*compratore*] satisfies [*giustifica*] the Judge to whom the sale is assigned, by bringing in the purchase money with interest and the expenses caused [*opere occorse*] by the requisition for re-sale, the re-sale does not take place. [Cf. *Code of Civ. Proc.*, Art. 691.]

897. If the vessels attached are barges [*barche*], boats [*scialuppe*], or other vessels of not more than thirty tons burthen, the sale is effected before the Judge to whom the matter is assigned, after the publication on three successive days of a notice [*bando*] affixed once to the mast, or, if there be no mast, to any other prominent [*apparente*] part of the vessel, at the outer [*esterna*] door of the Court House, and on the pier [*molo*] or quay [*scalo*], without other formality.

The sale cannot take place until eight clear days have elapsed from the notification of the attachment.

898. The provisions of the preceding Articles are applicable to boats [*battelli*] intended to carry passengers, and for fishing in harbours, basins [*darsene*], canals, lakes, and rivers, and for flats [*chiatte*], barges [*barconi*], and other

craft belonging to such places, if they do not exceed ten tons burthen, with the following modifications:—

- (1.) The proceedings are before the Prætor.
- (2.) The advertisements in the newspapers are not necessary.
- (3.) A previous deposit [*precedente deposito*] is not compulsory, but the last and highest bidder is bound to pay the purchase money and expenses at once, and in default of his so doing a re-sale is at once proceeded with at his expense.

Boats and other craft [*galleggianti*] fitted with steam machinery are excepted from these provisions.

899. The sale of the ship terminates the functions of the Captain, excepting any claim to compensation against those whom it concerns [*verso chi di ragione.*]

900. The person adjudged purchaser receives an extract from the account of the sale [*processo verbale*], stating:—

- (1.) The names, surnames, and residences of the plaintiff, creditor, and debtor.
- (2.) The name, description and burthen of the ship which is sold.
- (3.) The name, surname, and residence of the purchaser.

This extract must be copied into the register of the office in which the vessel is registered, and the sale must be noted in the ship's register.

901. Demands for the withdrawal (of things) [*separazione*] from the ship which is attached must be notified to the plaintiff-creditor [*creditore istante*] before the sale.

A demand for withdrawal made subsequent to the sale is transferred of right [*di diritto*] into a claim upon the purchase-money.

A demand for withdrawal must include a summons [*citazione*] to the plaintiff-creditor to appear for the hearing [*comparire a udienza*] of the matter before the proper tribunal, and an address for service, or a declaration of

domicile or residence in accordance with the provisions of Art. 647 of the Code of Civil Procedure.

If the demand is rejected, the claimant, besides costs and damages incurred, may be condemned in a money fine [*pena pecuniaria*] not exceeding 500 *lire* [francs].

902. Claims against the purchase-money must be made within three days from the day of the sale under penalty of being set aside [*decadenza*].

The creditors who are claiming must produce their vouchers [*titoli di credito*] in the registry within eight days of making their claim; failing their production within the period prescribed, the distribution of the purchase-money proceeds without their claims being included.

903. The marshalling [*graduazione*] of the creditors and distribution of the proceeds is carried out, as regards privileged creditors, in the order laid down in Art. 675, and as regards other creditors *pro ratâ* on the debts.

904. The provisions of the Code of Civil Procedure with respect to the forced sale of chattels [*esecuzione forzata sui mobili*] is applicable where no special regulation is made in this Title. The rules laid down in the present Chapter are to be observed in any other case of a Judicial sale of a ship, or a share in a ship, in so far as they are applicable.

[Ch. III. is omitted as relating to Procedure in Bankruptcy.]

TITLE II.

Of Prescription [*Prescrizione*].

915. Actions arising out of matters [*atti*] which are commercial even for only one of the parties are limited [*si prescrivono*] for all parties to the contract in conformity with the Commercial Law.

[This follows naturally from Art. 54 [*Code of Commerce*, Bk. I., Tit. VI.], which is as follows:—"If a matter is commercial for one party only all parties are subject in consequence of it to the Commercial Law with the exception of such provisions as concern the persons of traders [*commercianti*], and saving dispositions in the law itself to the contrary."]

916. The time for limitation runs even against soldiers on active service in war-time, against a married woman, and against infants [*minori ancorchè non emancipati*] and persons under a disability [*gli interdetti*], saving their remedy [*regresso*] over against their guardian [*tutore*].

The suspension [*interruzione*] of the limitation is regulated in accordance with the provisions of the Civil Code. [Arts. 1309, 2123 ss., 2141.]

Nevertheless, in Bill transactions [*obbligazioni cambiarie*], matters that interrupt [*atti interruttivi*] the period of prescription in respect of one of the defendants [*co-obbligati*] have no effect in respect to the others.

917. The ordinary period for prescription in commercial affairs is completed in 10 years, in all cases in which neither this present Code nor other laws lay down a shorter period.

918. An action to recover [*rivendicare*] possession of a vessel is barred [*si prescrive*] by the lapse of 10 years. The plea of defect in title or in *bona fides* is not available (to extend it).

A person who possesses a vessel in virtue of a *bonâ fide* transfer [*titolo*] properly registered [*trascritto*], and which is not invalid by reason of any informality, completes his title to it by prescription by the lapse of 5 years from the date of transfer [*trascrizione del titolo*] and its being inscribed [*annotazione*] in the ship's register.

A captain cannot acquire the property in the ship (which he commands) by prescription.

[919. Omitted as relating to Public Companies, Bills of Exchange, and Cheques.]

920. Actions arising out of contracts of bottomry [*prestito a cambio marittimo*] or pledge [*pegno*] on a ship are prescribed by the lapse of 3 years from the date on which they became due [*scadenza dell' obbligazione*].

[921. Omitted as relating to Prescription in Bankruptcy proceedings.]

922. Actions by brokers [*mediatori*] for their commissions [*diritto di mediazione*] are prescribed by the lapse of 2 years from the date in which the business was done.

[The rest of this Article is omitted as relating to Prescription in actions to set aside Bankruptcy proceedings.]

923. Actions for compensation of damages [*risarcimento di danni*] caused by collision [*urto*] between ships are prescribed after the lapse of one year, counting from the day on which the protest or claim mentioned in Art. 665 was made; and actions for General Average contribution, after the lapse of one year from the time of the discharge [*scaricamento*] being completed.

924. Actions arising out of contracts of affreightment [*contratto di noleggio*] are prescribed after the lapse of one year from the termination of the voyage, and those arising out of shipping articles [*contratto di arruolamento*] are prescribed after the lapse of one year from the end of the agreed term, or from the end of the last voyage, if the contract has been so extended.

Actions on policies of insurance [*contratto di assicurazione*] are prescribed after the lapse of one year.

In Marine Insurance the time is reckoned from the completion of the voyage insured and in time policies [*assicurazioni a tempo*] from the day on which the assurance expired. In case of the presumption of the loss of a ship in consequence of no tidings being received of her (*i.e.*, in the case of a missing ship), the year commences at the end of the period laid down for presuming the loss (see Art. 633): Saving always the further periods laid down in case of an abandonment in Bk. II., Tit. VI.

In other insurances against loss and on lives, the time begins to run from the moment at which the event happens which gives rise to the action.

925. The following actions are also prescribed after the lapse of a year :—

- (1.) Those for payment for provisions [*amministrazioni di vettovaglie*], timber [*legnami*], fuel, and other necessities supplied for the repair or fitting-out of a vessel for a voyage, and for work done for the same object.
- (2.) Those for boarding [*alimento*] seamen and other members of the ship's company by the order of the captain.

The time runs from the date at which the goods were supplied, or the work done, unless any time (for payment) was agreed on, in which case the time for prescription does not run during the period [*dilazione*] so agreed on.

If the supplies [*somministrazione*] and labour [*prestazione d'opera*] are continuous for several days in succession, the year is reckoned as commencing on the last of the days.

926. Actions against a carrier [*vettore*] arising out of the contract of for carriage [*trasporto*] are prescribed :—

- (1.) By the lapse of six months, if the despatch was to a place in Europe, excepting Iceland and the Faroe Islands, or to a seaport of Asia or Africa, in the Mediterranean or Black Seas, or the Suez Canal or the Red Sea, or to any inland place [*piazza interna*] connected with such places [*marittime*] by railway.
- (2.) By the lapse of one year, if the despatch [*spedizione*] was made elsewhere.

The time begins to run in case of total loss from the day on which the goods despatched ought to have arrived at their destination, and in case of partial loss, injury [*avarìa*], or delay from the day on which the goods are delivered [*riconsegna*].

[End of Bk. IV.]

CODE OF COMMERCE: ITALY.

PROVISIONAL DISPOSITIONS [*Legge Transitoria Commerciale*].

By Royal Decree of 14th December, 1882, Provisional Dispositions were enacted for the execution of the Commercial Code.

The following relate to the Maritime portion of the Code :—

ART. 13. All contracts for building, acquiring, or hiring [*godimento*] a ship or part of a ship, and contracts of pledge [*pegno della nave*] and bottomry on a ship, already made in accordance with the previous Law, remain in full force if the formalities were concluded before the new Code came into force; otherwise the dispositions of the new Code apply.

ART. 14. Requires all vessels to conform to Art. 500 of the new Code within six months from the date of its coming into operation, or if at sea at that time, then within six months of arrival at a port within the Realm.

ART. 15. Privileged debts [*privilegi*] (liens) under the old law are preserved intact [*conservano il loro grado*] and the privileges given by Art. 678 and those following it are made retrospective.

ART. 17. Proceedings which are in progress [*pendenti*] to attach, arrest, and sell vessels, and to divide the proceeds, are to be carried on at once in accordance with the provisions of the New Code [Bk. IV., Tit. I. Ch. II.].

ART. 18. The periods of time by which an action is barred [*I termini per l'inamissibilità*] are governed by the Law in force at the time of the event which gives rise to the action.

ART. 19. Times which have begun to run so as to prescribe actions before the New Code came into operation continue to be governed by the former laws, except where the period for prescription is shortened by the New Code where it is to apply.

ORDER [*Regolamento*] FOR CARRYING OUT THE CODE OF
COMMERCE.

[Titles I.—IV. do not relate to Maritime Law.]

TITLE V.

Dispositions Concerning Maritime Commerce and Navigation.

ART. 68. Declarations and contracts for the building, acquiring, and hiring [*godimento*] of ships, as also contracts of pledge and bottomry when made by private deed [*per scrittura privata*] (= *sous seing privé*) cannot be received for registration [*trascrizione*] on the Register of Shipping, unless the signatures of the parties are verified [*autenticare*] by a Notary, or Judicially recognised [*accertate giudizialmente*]. Nevertheless, the above-mentioned documents [*atti*], where they refer to boats [*battelli*], or other harbour craft [*galleggianti*], which are exempted from the obligation of having a register, may be received for the purpose of being entered [*annotazione*] on the Register mentioned in Art. 900 of the Regulations [*Regolamento*] for putting in force the Mercantile Marine Code, although the signatures are rendered valid [*legalizzate*] only by the Syndic.

ART. 69. Ships and other harbour craft, intended only to navigate on lakes and rivers, can be entered on a Register in the Form [*modello*] (E) annexed hereto, in the office kept for the purpose; and, if there be no such office, then in the Communal office of the place where the ships or other craft are usually kept [*tenuti*]. If the place is changed, the official above mentioned, or the Syndic of the Commune where the entry is made, must forward a copy of the entry [*partita*], with all the things noted [*annotazioni*] upon it, to the Syndic of the place in which the new station (of the vessel) is located.

ART. 70. Specifications [*dichiarazioni*] and contracts for the building, ownership, or leasing of the vessels and harbour craft mentioned in the last clause [*capoverso*] of

Art. 68 and in Art. 69, and all restrictions on the free disposal of them arising from a pledge or other claim [*vincolo*] have no force as regards third parties, unless either the original documents on which they are based, or verified copies [*copia autentica*] of them, are lodged in the office, and entered on the Registers mentioned in the said Articles.

The entries [*annotazioni*] must be made at once, on the personal responsibility of the special official, or of the Syndic; and the documents which are presented in support of the request for registration must be preserved in a book provided with an index [*elenco*] and alphabetical list [*rubrica*] of the names of the owners and others who have claims [*aventi diritto*].

ART. 71. The ship's Inventory, mentioned in Art. 500 of the Code of Commerce, must be made out in accordance with the Form established by the Ministry of Marine.

It must contain a printed list [*indicazione*] of the apparel [*oggetti di corredo*] and furniture in use, and of the spare stores [*attrezzi fissi e di rispetto*] required by Maritime Laws for each sort of voyage, and according to whether it is made out for a sailing-vessel or a steam-vessel; it must also contain a statement in writing of the amount of articles and of other things which are actually on board the ship.

The Inventory must be signed by the Captain and countersigned [*vidimato*] by the officer, or by the experts [*periti*], whose duty it is to survey [*visita*] the vessel in conformity with the provisions of Art. 78 of the Code of Mercantile Marine.

ART. 72. Changes [*variazioni*] in the ship's Inventory must be stated in the columns assigned for the purpose in the Form mentioned in the preceding Article, and they will be proved [*giustificate*] summarily by a simple reference to the remarks which are found in the Log-book [*giornale generale nautico*].

The officer or experts must certify by their *visa* [*visto*] the regularity of the Inventory, and of the charges in it referred to above, in the successive surveys of the ships made in conformity with the Maritime Law.

Before leaving a port in which the Captain has reported casualties [*sinistri*] previously sustained, and which have caused loss or damage to the articles contained in the Inventory, the Captain must shew, by the *visa* [*visto*] of the Maritime or Consular authority, that he has replaced [*surrogato*] the lost or damaged articles with which the vessel was supplied with others.

For those vessels which, in conformity with the Laws above mentioned, are not bound to be surveyed, the survey for verification of the Inventory [*inventario*] must be made every two years.

ART. 73. The Captain's report in the case for which provision is made by Art. 517 of the Commercial Code, if not made in writing, is taken by means of a deposition [*processo verbale*] (*procès verbal*) by the President, or by a Judge appointed [*giudice delegato*] for the purpose, or by the Prætor whose business it is, assisted by the Registrar [*cancelliere*.] The same authority must state in the Log that he has received the report.

The order [*decreto*] fixing the day on which the report must be verified, is written in the margin (of the report), and both the notices [*avvisi*] which are to be placarded, and the report [*relazione*] of the officer [*usciera*] of the Court that they have been placarded, are made on unstamped paper [*carta libera*] and without any fee to the official [*diritti d'usciera*].

It is the business of the Registrar [*cancelliere*] to notify the appointed day to the Marine Office, which is bound to forward in all cases to the Judicial authority which has received the report, all the documents mentioned in the

2nd and 4th clauses of Art. 115 of the Mercantile Marine Code.

ART. 74. The agreement [*accordo*] between the owners or charterers [*armatori*] of a ship and the captain as to the composition of the crews and the pay of the persons who comprise it, provided for in Art. 499 of the Commercial Code, may be the result of both parties agreeing on the ship's articles [*contratto di arruolamento*]; but if the captain does not desire to avail himself of the powers which are given him, and the crew are shipped by the owners or charterers, they can also sign the contract.

Where several ships belong to the same persons, if the persons who are engaged undertake to do duty during the term of their engagement upon such of the ships belonging to the same owners or charterers as they may be in succession appointed to, and for the various voyages which the vessel or vessels may undertake, the engagement may be made in a single contract.

ART. 75. In the case for which provision is made in the last clause of Art. 522 of the Code of Commerce, the muster roll [*ruolo dell' equipaggio*] made out in accordance with the dispositions of Art. 325 of the Order [*Regolamento*] for putting the Mercantile Marine Code in force, has the same legal effect as the shipping articles [*contratto d'arruolamento*].

ART. 76. In applying Art. 676 of the Commercial Code, the endorsee [*giratario*], the transferee [*cessionario*] of a claim against a ship or person subrogated [*surrogata*] (to them), or person to whom a claim against the ship is pledged [*creditore con pegno di un credito*], which claim is registered [*trascritto*] in the Marine Register, and noted [*annotato*] on the ship's register, has a right to require that the endorsement [*girata*], transfer [*cessione*], or subrogation [*surrogazione*], or pledging [*costituzione in pegno*] be noted wherever the vessel may be, provided he produces his title

in legal form [*titolo in forma autentica*] to the Maritime or Consular authority of the place, and that the ship's register is also produced to him.

The Maritime authority enters [*trascrive*] the document [*atto*] of title in its register, notes it in the ship's register, and forwards an office copy [*copia autentica*] to the Marine Officer of the place where the ship is registered. The latter must at once note it on the margin of the register of the debt [*trascrizione del credito*] and on the entry [*matricola*] of the ship's register.

F. W. RAIKES.

Quarterly Notes.

The Circuits and the Business of the Courts.

Since the days of Sir Alexander Cockburn, it has been a rare spectacle to find a Lord Chief Justice of England complaining of the action of one of his colleagues, more especially when that colleague is no less important a personage than the Lord High Chancellor. Lord Coleridge's predecessor did not scruple, it is true, to express, in that vigorous language of which he was so perfect a master, his objections to legislation which in his latter days appeared to be impending—we refer to the Criminal Code—not to mention more than one controversy into which he entered with other dignitaries of the State. But since that time there has been little or nothing to break the outward appearance of harmony on the Judicial Bench, save an occasional ebullition from the respected and popular Lord Bramwell, who is pretty well acknowledged as moving within an orbit of his own. The Judicial Camarina has, however, at length been disturbed by what at first bore ominous indications of an unseemly conflict. Conciliatory counsels,

however, would seem to have prevailed with the Chancellor, and that danger has, therefore, fortunately been averted. It was a proposed Order in Council, whereby Civil business in something like thirty-four Assize towns was to be abolished by a stroke of the pen, which evoked from the Lord Chief Justice an emphatic and unqualified protest. To the accident of his being prevented from embracing the opportunity of expressing *vivâ voce* to his brethren his uncompromising opposition to this arrangement, the outside world is indebted for the publication of a letter in the *Times*, setting forth at some length the general views which Lord Coleridge entertains upon this subject. Two points to which he directs attention are unquestionably deserving of very serious consideration. There can be no doubt that the adequate administration of Criminal justice in this country is one of primary concern to the public at large. Criminal cases, and especially those of a kind which lend themselves to being sensationally reported in the newspapers, are scrutinised by all classes of readers without the slightest regard to their relative importance; whilst the right decision of a Civil case, involving, it may be, half a million sterling, arouses not the smallest interest whatever, save amongst the parties immediately concerned. The mistake of an over-zealous guardian of order may bring defeat and temporary discredit upon even a powerful Government. For political reasons, therefore, no less than for those of humanity, it is essential that Criminal investigations should be conducted in a manner commanding the respect of the Nation, and it is no exaggeration to say that by the abolition of Civil Assizes a very grave blow would be dealt at the administration of Criminal justice in the Provinces. The fact is incontrovertible—though in the non-legal mind there appears to be an extraordinary amount of ignorance on the subject—that the habitual practitioners at the Criminal Bar cannot compare, either in professional

standing or in forensic ability, with those who devote themselves almost exclusively to Civil business. These latter are induced to attend the Circuits by reason solely of the Civil actions wherein they are retained, and there is nothing *infra dig.* in their entering the Crown Court on Circuit, for the prosecution and defence of prisoners upon moderate conditions. To do away with the Civil business on Circuit, would be to remove the only chance of obtaining the services of such men in Criminal cases, without the payment of a special fee so large in amount as to be, in the vast majority of instances, prohibitive.

The second point raised by the Lord Chief Justice is one to which, in some form or another, we have before had occasion to refer. It is the method of devolution, whereby Parliament delegates to the Judges the duty of legislation, which, nevertheless, it is the special province of Parliament to discharge. At times it is by Rules of Court, promulgated in a body occupying the space of a more or less bulky volume; and at other times it is by Order in Council, proposing to set at naught, by a process which affords practically no opportunity for discussion, the customs and usages of many centuries of our history. Happily, the outcry which has been raised in the counties against the change has found an echo within the walls of Parliament itself, and has even touched a responsive chord in the breast of a powerful Judge.

It is, indeed, by a somewhat curious irony that the Lord Chief Justice is found deprecating a system which, as Attorney-General, he himself inaugurated, whilst Lord Halsbury, who, when at the Bar, was loud in his denunciations of this method, now endeavours to enforce it. *Tempora mutantur.*

On the other hand, there is no question as to the falling off of heavy Civil business in the Provinces, of recent years, though the same circumstance is equally noticeable in the

London Cause Lists. What is the explanation? It is all very well for some of the Judges to ascribe it to the malignant ingenuity of counsel in devising interrogatories of so vexatious a character as to drive from the Courts suitors in substantial mercantile causes. Whenever matters Judicial do not give satisfaction to all interested parties, it has been the fashion of late years to lay the whole blame upon that *caput mortuum*, the Bar. A year or so ago it was the Solicitors who vehemently inveighed against, and threatened extinction to, the exclusive Privileges of the Bar. At the present time it is the Judges, who, seeming to ignore that they owe their own promotion to the success attained within its ranks, attempt, apparently, to gain a cheap popularity by becoming its assailants. We do not hesitate to re-affirm what has on more than one occasion been urged in this *Review*, that the true cause of diminution in the best class of litigation is to be found partly in a faulty arrangement of the Cause Lists which drives suitors from pillar to post, but chiefly in the Rules of Court, which, aided by Judicial interpretation, have frittered away the right of Trial by Jury, and placed in the hands of the Judges an arbitrary power over the Costs of all proceedings that come under their cognisance. Should the questions raised by the Lord Chief Justice awaken Parliament to a sense of its obligations by inducing it to resume its proper functions, the Profession and the public will alike be immensely the gainers.

* * *

• **The Mayor's Court.**

The nomination to the vacancy in the Assistant Judgeship, caused by the death of Mr. Brandon, appears to have aroused considerable commotion in the City, and the merits of the new occupant of the post have been subjected to some not too generous criticism from the circles in which he

till recently moved. Expostulations have been pretty freely indulged in regarding the action of the Recorder; the Lord Chancellor himself, as approving the Recorder's selection, has not entirely escaped the blast of Catonian censure. Let it be said, at the outset, that into this unnecessary controversy we have no desire or intention to enter. But the moment seems opportune for pointing out that, as frequently happens in the tempest of discussion, the really important matter of principle underlying it has been almost wholly overlooked. So long as Mr. Roxburgh continues to exercise those qualities of patience, courtesy, and painstaking industry, which, from the accounts that have reached us, he would appear to possess, the Public will not have any valid ground for complaint in this individual instance. What, however, is of far greater, nay, of pre-eminent, concern alike to merchants and malefactors in the city of London, is the anomalous method whereby Judicial offices in the gift of the Corporation are distributed. In practice, though not, perhaps, in theory, the choice of the Judges, high and low, rests with the Lord Chancellor. Sufficient confidence is reposed by the Nation in the holder, for the time being, of that exalted dignity, to entrust him readily with this difficult and delicate function. But such delegation would seem to be viewed as a dereliction of duty by the hyper-sensitive consciences of our City magnates. Probably, indeed, the feelings of the Aldermen and Common Councilmen would be scandalously outraged, were it even hinted that they might with public advantage renounce this cherished *privilegium*. And yet there is considerable danger in continuing to permit them to choose their Judges after a fashion which in America, where it is in vogue, is deprecated as a source of many serious abuses. We are far from desiring to canvass the legal qualifications or Judicial temperament of the several holders of City

appointments ; yet it might be possible, without involving the slightest disrespect to the present occupants of the Mayor's Court Bench, to suggest that, in the selection of recipients for Judicial honours, the Corporation has not always distinguished itself by a sound discernment.

Another grave defect connected with the administration of Justice in the City is the antiquated Procedure of this its chief tribunal. Nothing save an unreasoning reverence for what is obsolete, or an inveterate hostility to any change, however beneficial, can account for the steadfast retention by the City of a system which has been discarded by the very Courts from which it was borrowed. Apart from the inconvenience and waste of time which a knowledge of the intricacies of the Common Law Procedure Acts involves for every practitioner called to the Bar, or admitted as a Solicitor, since the passing of the Judicature Acts, the Mayor's Court method of Pleading has dropped into a condition of laxity which might well make the hair of *quondam* students of *Bullen and Leake* stand on end ! Either the Mayor's Court should adopt the Procedure of the High Court, or it should have that of the County Court applied to it, in which latter event it might be amalgamated with the City of London Court, where the County Court practice is at present in force. But why, it may be asked, do solicitors rush to its portals, and flood it with litigation, if, as is alleged, Justice is therein hampered by such flagrant anomalies ? Firstly, it may be presumed, for the best of all reasons : the Costs are dealt out there with a more liberal hand than in the High Court. Secondly, because suitors care more for expedition than the most highly trained Judicial intellect, when the obtaining of the latter is certain to entail months of weary waiting, coupled with an unwelcome liability to a lengthy series of appeals. And, lastly, because, upon the whole, the costs of Trial are more moderate there than in the High Court.

"Threatened men live long," they say, and, though many a would-be Law reformer feels a covert longing to lay rude hands upon this survival of a bygone age by improving it off the face of the earth, yet, whilst things remain as they are in the High Court, such a vision can only, we fear, be considered Utopian.

* * *

The Prosecution of Offences Act, 1879.

Certain extraordinary provisions of this Act (42 & 43 Vict., c. 22), which enable the Director of Public Prosecutions to withdraw his aid and prestige from any case which he has taken up, have already been fully described in our pages [*Law Magazine and Review*, No. CCXLIX., for May, 1883. Art. *The Prosecution of Offences Act, 1879*, by Almaric Rumsey]; and the dangerous and perhaps unconstitutional nature of those provisions was then pointed out. It has lately been suggested that the officer above-mentioned may take up the prosecution of Police Constable Endacott, notwithstanding that proceedings against the same person for the same alleged offence have already been commenced by a private prosecutor. It is provided by s. 7 that the Director cannot be bound over to prosecute, and that no other person need be bound over so long as he carries on the case; there will, therefore, if the Director should once take the matter in hand, be no person responsible for continuing the proceedings. If, as time goes on, the Director should think fit to "abandon" the prosecution, there is nothing to prevent him from doing so. If, perchance, he abandon it, there will practically be an end of the case; and a subordinate and non-Judicial officer will thus have discharged the duties of a magistrate, perhaps of a Judge and Jury. It is true that a private individual, if he "have good cause for so doing," may apply to the High

Court by affidavit, and that the Court, after hearing the Director, may give directions as to the mode in which the proceedings may be continued; but it is obvious that a person so applying would be heavily handicapped, even if he ventured to brave the frightful expense of an application opposed by a public officer whose conduct had been impugned. The case of Miss Cass has excited great attention, and public opinion, as represented in the House of Commons, has shewn that a thorough inquiry is necessary. It is as well that the public should know what serious risks such an inquiry must run through the singular provisions of a recent Act of Parliament.

[*Note*.—It will be obvious, of course, that the above was written before the announcement in the daily papers of 17th August, to the effect that the prosecution of Endacott would be carried on by the legal advisers of Miss Cass. But the principle of our valued Contributor's Note is not affected, and the Director of Public Prosecutions cannot, we apprehend, divest himself of his statutory right to take up the case, if he should see fit to do so, at some future time.—ED.]

* * *

The Judges and the Privilege Debate.

It has always been the policy of those who have had the conduct of the *Law Magazine and Review*, from its very inception, to steer clear of Politics, in the partisan sense of the term. In no party spirit, therefore, is it that we would advert to the Debate which took place in Parliament, during the early part of May, touching the issues which have been raised between the Irish Home Rule Party and the *Times* Newspaper. Whether a Committee of the House of Commons, or a Court of Law, would be the more fitting Tribunal to enquire into the truth of the charges which

have been advanced, it is beside our purpose to consider ; but what it is impossible to pass over in silence, is the doubt which has been cast upon the capacity of the ordinary Tribunals of this country to dispense even-handed justice between the parties. Had such a suggestion proceeded from any ordinary quarter, we might simply have put it aside, but when a late Prime Minister, supported by one who has been a Law Officer of the Crown and a member of the Cabinet, deliver themselves of opinions of this character, it is impossible to avoid taking note of their conduct. To herald it forth to the "civilised world" abroad, and to instil into the minds of the ill-informed, uneducated, and discontented at home, that English Judges are not impartial, and that the convictions of English Juries are liable to be warped by political prejudices, is to aim as deadly a blow at some of our most cherished institutions as has been dealt during the past half-century.

The Bar is the guardian of its own honour, and its representatives, both within and without the walls of Parliament, are well able to repel the extraordinary attack Mr. Gladstone has made upon it. But his charge against the Tribunals of his country is quite another matter. To assert that there are reasons why we should be unable to trust the Judicial Bench—many members of whom he himself promoted to the position they now occupy—is to utter a calumny which, we should think, must inevitably tarnish the fame of any rhetorical genius, however brilliant.

And upon what materials are these imputations founded ? Even Mr. Gladstone, after ransacking the storehouse of his memory, could only produce some idle gossip about Lord Dundonald's case in 1814, and the advice which he said had been given him by his solicitor since deceased,—whereas "Historicus" was thrown back upon the general allegation of Judicial corruption at the beginning of this century. But perhaps we are forgetting that the probable

motive for such wholesale attack was to punish Mr. Justice Stephen for his destructive dissection of the Home Rule scheme, when it was first sprung upon the Legislature by one who is known as the "Old Parliamentary hand." Whether this was the reason or not, it remains that upon such materials a charge has been made which is conspicuous for its recklessness. Nor can we forget that it was necessary for its authors to shelter themselves behind the shield of Parliamentary Privilege, for the purpose of assailing with impunity a body of men who by their very office are powerless to retaliate.

As an organ of Professional opinion, we have never hesitated to criticise freely the action of the Judges, both in their individual and in their collective capacity, and in so doing we have acted no less within our moral, than within our legal, right. The Judges, indeed, have themselves invited us to do so (see *Regina v. Sullivan*, 11 Cox C. C. 50). But had we, either directly or by skilfully contrived insinuation, intimated that "there is any one of Her Majesty's subjects, either English, Scotch, or Irish who would not get, not only justice, but protection against popular feeling, if his case was tried before one of Her Majesty's Judges," we should, for thus endeavouring to throw discredit upon the Tribunals of the Kingdom, have rightly rendered ourselves liable to pains and penalties from which those who utter similar sentiments in the House of Commons are entirely free. Unhappily for this country, there are many who will accept such suggestions when put before them by the bearer of a great Parliamentary name, but among our sober-minded citizens such groundless aspersions can only recoil on the heads of those who make them. Our Judges need no defenders, for, in the words of the Attorney-General, "their public life, their fearless conduct, their determination to express their opinions even against popular feeling, have shewn that they are men

determined to do their duty." Those, however, who cast such aspersions deserve a well-timed reproof, and this they have received at the hands of a dignified and high-minded politician,—Sir Henry James,—who performed his duty so successfully that, to borrow a phrase of Mr. Gladstone, it would be almost profane—it would certainly be superfluous—to attempt to do it over again. "There are," said Sir Henry James, "some of the Institutions of this country " which might well have been spared even in the extra- " ordinary heat of Party conflict, and it is with regret and " repugnance that many members of the House have heard " the assertions which have been made upon high authority " —upon the highest authority—in relation to the adminis- " tration of Justice in this country. These statements " were not intended for this House alone, nor only for this " country, but for countries outside ; and strangers and " foreigners will be told that that Institution to which we have " often pointed with so much pride, the security of Justice " in Trial by Jury, has fallen so low that in the highest " quality that jurymen ought to possess—impartiality— " owing to circumstances of political excitement, they will " be deficient, and that jurors will be governed by prejudice " and political views."—*Hansard*, [314] 1138. *Times*, May 7, 1887.

When those to whom the control of the destinies of this great Empire has been and may again be entrusted, resort to methods of Parliamentary warfare such as we have before indicated, it would indeed appear that the "resources of civilisation" are well nigh "exhausted;" for if, when engaged in this "International controversy" (as Mr. Gladstone euphemistically calls it), they calumniate an upright and defenceless body of men, we cannot but think that such specimens of the *vulnera diligentis* are rather worse than would be the *oscula fraudulenta odientis*.

Reviews.

The Interpretation of Mercantile Agreements. By J. DENNISTOUN WOOD, Barrister-at-Law, formerly Attorney-General for Victoria. Stevens and Sons. 1886.

This book certainly shews one thing, namely, that the author himself has a very clear head and logical mind; but, on the other hand, it is a defect in the book that it requires an equally clear head and logical mind to follow the author, and these are an outfit that not everybody—and perhaps less than others those who have recourse to a text-book on the Interpretation of Agreements—is provided with.

The propositions laid down are no doubt generally correct; but on the heels of each follow illustrations, notes, corollaries, and appendices, of the last, short ones at the ends of chapters, and long ones at the end of the volume. And it becomes somewhat difficult to say for whose use the book was intended, the clauses being too involved for students, too long for practising lawyers, too technically difficult for merchants. Take for example section 240. The marginal note is “*prima facie* the exceptions (in a bill of lading) do not apply to a loss occasioned by the shipowner’s negligence.” This is a very good general proposition, and might be shortened by leaving out the words *prima facie*, but the text of the article is as follows:—

“Section 240 (1). Words in a bill of lading restricting the liability of the shipowner or master will not, unless a contrary intention be clearly shewn, exempt him from liability for a loss occasioned by the default of his servants or the crews employed on the carrying vessel.”

Now that is a much wider proposition than the marginal note leads the reader to expect, and it is most awkwardly worded from the use of the word “contrary” in the first instance, and from it not being clearly stated whether “his servants” generally are meant, or only those, like the crew, employed on the carrying vessel. Then follows half a page of illustrations in small type; then, as explanatory of the illustrations, a reference in large italics to Note II., pp. 153-155; then, still in large italics, a statement that other illustrations are referred

to in the foot-note; and then the further proposition in large type:—

“(2.) But they will exempt the shipowner from liability under the Agreement (see the Note) for loss occasioned by the default of a master or crew of another vessel belonging to him;” and then follows in small type a long *résumé* of the well-known case of the *Chartered Mercantile Bank of India, &c. v. Netherlands East India Steam Navigation Co.*, and then, a further Note in large italics, as follows:—

“Note.—The shipowner, though not liable in an action founded on the Bill of Lading, is liable in an action for a tort in which action half the amount of the loss would be recovered.”

Now this is at least misleading, for whilst the clause in the Bill of Lading exempted the shipowner from liability on the contract as carrier, he was not liable for a breach of the contract by reason of the negligence of his servants in the other ship because he had not contracted at all relatively to them; and as to the Note, a reader not versed in the peculiar practice of Admiralty Law may well wonder why, as there is no contribution between tortfeasors, the shipowner was only liable for half the damages in an action of tort; the true answer being that the cargo laden on board one of the ships being damaged by collision can, where both vessels are to blame, recover either the whole from the carrier on the contract, if not precluded by the terms thereof, or the half from the other ship for the tort, under the peculiar provisions of the old Admiralty Law now made law for all the Courts by the Judicature Act. And, in the particular case, the owner of the cargo was held to have barred himself from the remedy in the contract of carriage by the terms of the contract, and, therefore, was relegated to the half damages for the tort committed by the other ship.

The above propositions are, however, stated without corollaries, and have no appendix, and are therefore simpler than many.

The statement of section 245, that a collision occasioned by the negligence of anyone is not a peril of the seas, is no longer a correct statement of English Law, in consequence of the recent judgments in the House of Lords in the case of the *Xantho* (*Times*, July 15th, 1887), but that, of course, is not the fault of the author, who, moreover, in the very next paragraph has, so to speak, by accident been right, as he gives the judgment of

Lopes, L.J., in the *Rat* case, *Pandorf v. Hamilton*, which was subsequently reversed by the Court of Appeal, and on the same day as the case above-mentioned, reinstated in the House of Lords. Whilst on this subject, we may further point out that the House of Lords, in the case of *The Thames and Mersey Mar. Ins. Co. v. Hamilton*, in which judgment was also given on the same day, have, in reversing the judgment of the Court of Appeal referred to in the author's note to section 396, practically overruled the *West India Telegraph Co. v. Home and Colonial Ins. Co.*, 6 Q.B.D. 51, on which Mr. Dennistoun Wood bases that section. In passing, we may observe that, even if it were not overruled, the marginal note to that section, stating that "the liability of insurers is not excluded by the negligence of the assured," is much too broad, and should probably have run "by the negligence of the servants of the assured." The Appendix of "Words and Expressions" used in Mercantile Agreements, the meaning of which has been decided Judicially, is in our opinion likely to prove the most useful part of the work, as its contents appear, so far as we have been able to test them with the authority given for them, to be accurate, and its compilation must have required great diligence and labour.

The cases we have noted shew how rapidly the usefulness of a book of this description must decrease if not kept absolutely up to date, and we cannot help thinking that if Mr. Dennistoun Wood adopts this view and brings out a second edition, he will do well to condense his notes and pay a little more attention to the actual wording of the Treatise, and by so doing increase its value tenfold. As we began by saying, the book shews its author to be a very clear-headed man. But no one who is not exceptionally gifted in that way can, we submit, be expected, without the deepest thought, to understand the meaning of such a paragraph as this, which is the heading of Chap. IV., Part V., Book IV. "Of perils from liability for loss occasioned by which the insurers are exempted by the express provisions of the Policy, either absolutely, or unless the loss exceeds a certain proportion of the value of the subject of insurance." Or of this, which appears in large italics after section 332 :—"As to the time when a vessel is insured 'at and from a port' within which she shall arrive at the port, see *post*, section 343 (11)." These examples, taken at random, shew that the book cannot be lightly taken in hand in order to find out at once, and at a sight, the construction to be

put upon words in Mercantile Agreements, though, as we said, parts of it are now of great value, and the value of the whole may without much difficulty be greatly enhanced in a second edition, which we hope soon to see.

A Treatise on the Statutes of Elizabeth against Fraudulent Conveyances; the Bills of Sale Acts, 1878 and 1882; and the Law of Voluntary Dispositions of Property. By the late H. W. MAY. Second Edition. By S. W. WORTHINGTON, Barrister-at-Law. Stevens and Haynes. 1887.

This is practically a new book, and the editor may be congratulated on the excellent taste with which he has built on Mr. May's solid foundations a work adapted to more modern requirements. The preliminary chapter, on the general operation of the material statutes of Elizabeth, is one of those clear summaries of the state of the law which commend themselves to the practitioner who wishes from time to time to refresh his knowledge of general principles before elaborating them for operation in detail, and might conveniently be to some extent itself summarised in parallel columns for contrast. Any definition of Fraud in its special relative sense is wisely avoided, but its occasions are illustrated with lavish wealth of example. The difficult question as to the extent to which a ripening liability on the part of a settlor may avoid any dealing by him with his property, is discussed more than once in the volume, and on the whole, we think, with accuracy. A moderate use of the book in practice has been somewhat marred by the lack of marginal references to the Parts and Chapters into which the book is divided, references doubly necessary when such Parts and Chapters—e.g., "*post*, pt. v. Ch. ii."—are the only directions contained in the footnotes. The Index is, on the whole, excellent, but should have included such heads as Pressure, and Forbearance to Sue. The book is one to buy, and keep noted up to date.

Principles of the Criminal Law. By SEYMOUR F. HARRIS, B.C.L., M.A. (Oxon.) Fourth Edition. By AVIET AGABEG, of the Inner Temple, and of the Northern Circuit, Barrister-at-Law. Stevens and Haynes. 1886.

When the third edition of this useful work was under review, we had occasion to call the attention of its present editor to

several important omissions. These appear, so far as we have verified them, to have been in every instance supplied, and we can only regret that the lesson which we then inculcated has been but partially taken to heart. A glance at the very Preface to the present edition exhibits traces of the undue haste with which it has been passed through the press. Unfortunately, in the body of the work, misprints are numerous, and references are not unfrequently inaccurate, while the announcement in the Preface that the legislation and cases of the two years which have elapsed since the publication of the last edition have been incorporated, is, upon investigation, not adequately borne out. More than one important decision, which might appropriately have found its way into even an elementary work such as the present, has been omitted. As regards legislation, whilst the Naval Discipline Act, 1866, is cited, no reference is made to the amending Statute of 1884. The same observation applies, *mutatis mutandis*, to the Prosecution of Offences Act, the Sea Fisheries Act, the Criminal Lunatics Act, and the Post Office Protection Act, all of the year 1884. Moreover, the Corrupt Practices at Municipal and other Elections Act, of the same year, should have been mentioned in connection with the offences provided against by 46 & 47 Vict., c. 51 (Parliamentary Elections) which are set forth in some detail. So again, Mr. Agabeg refers to the statutory prohibition of injuries to the Telegraph, whilst of the Submarine Telegraph Act, 1885, dealing with the same subject, no notice is taken. Harris's *Principles of the Criminal Law* is, by reason of its form and style, so serviceable a book for the student, that we cannot but hope we may see in the next edition a volume free from all preventible inaccuracy.

The Bankruptcy Act, 1883, and Rules, 1886. By HIS HONOUR JUDGE CHALMERS, and E. HOUGH, Inspector in Bankruptcy, Board of Trade. Second Edition. Waterlow and Sons, Limited. 1886.

It might naturally have been expected that a lawyer who is generally reputed to be responsible for the drafting of the Bankruptcy Act of 1883, and an official to whose department of the Board of Trade the working of that Act is specially assigned, would together have produced a volume upon this subject which, if not in all respects comprehensive, should at least have

been capable of being relied upon as a safe and sure guide upon questions commonly arising in the course of Practice in Bankruptcy. Those, however, who may consult the work before us with this reasonable anticipation will find, unhappily, that their hopes have not been realised. The rapidity with which the first edition was brought out after the passing of the measure seemed to some extent to account for the meagreness of the notes and the paucity of cases accompanying them. The references to the changes which the Act had undergone whilst in Committee of the House of Commons, though substantially useless to the Practitioner, might also have been passed over as indications of the different views of its framers, or pardoned as springing from a not unnatural desire to place the responsibility for faulty legislation on the proper shoulders. But no such excuses can justly be urged in favour of the edition of 1886. We find the references to the passage of Bill through Committee still retained at pp. 66, 171, 239, and perhaps elsewhere; and though the number of cases cited has somewhat increased, the list is still very far from being complete; whilst a single Report, and that not always the fullest or most accurate, is alone referred to.

With every desire to recognise the good work of persons who are unquestionably competent to give it to us, and who, in this case, were undoubtedly peculiarly fitted for the task, we regret to find ourselves compelled to say that the present performance of Judge Chalmers is not up to the standard which his well-known ability, and his interest in Codification, gave us the right to expect that he should have attained in a field so germane to his sympathies.

The Law and Practice of Petition of Right. By WALTER CLODE, Barrister-at-Law. Clowes and Sons. 1887.

He who will buy this book must take it "with all faults," and he shall receive, notwithstanding, good value for his money. It is an honest attempt to shed light on darkness, and to solve the insoluble. It is a lucid endeavour to square circular arguments, and to get round square ones. The book lies in the compass of 200 octavo pages, and we commend them to all and sundry who have or are likely to have dealings with the Crown, as well as to members of both branches of the Profession who may have to advise thereon. Mr. Clode has had the courage to

resist the temptation to deal with the historical side of the question at great length: to a certain school of lawyers of the present day, disquisitions on "historical aspects" are very dear: to the Professional reader they are seldom welcome. But with regard to the Petition of Right, some history is inevitable; and so much as is necessary is to be found clearly and accurately stated in Mr. Clode's pages. We have said, however, that the book has faults, and we must make our position good. For the misuse of the term judgment "in rem," which we think should be written judgment *in rem*,—there is no excuse: a judgment dealing with the title to land is as much a judgment binding only the parties thereto as a judgment in an action of detinue. For certain misconceptions in Chapter VI.,—"Where the Petition should be sued,"—there is much more excuse. Mr. Clode bases much of his argument on the judgments of Malins, V. C., in *Reiner v. Marquis of Salisbury*, and *Doss v. Secretary of State for India*. Now, although both of these cases may have been, and probably were, rightly decided, the principles laid down by the late learned Vice-Chancellor require much revision before they can be accepted as sound expositions of the law. In both of them, the learned Judge rode one of his pet hobbies,—his often expressed antipathy to foreigners making use of the English Courts. No amount of reversal by Courts of Appeal could kill the favourite steed. We trust, however, that in his second edition Mr. Clode will sacrifice the greater part of page 43, and give us better-known and more trustworthy authorities for the rule—which, indeed, in these days might be stated without express authority—that the English Courts (and we believe all other Courts) refuse to entertain actions relative to the title of land out of the jurisdiction. This rule applies as well to Petitions of Right as to ordinary actions. The deduction, therefore, on page 44, that the same rule would hold good with regard to contracts, is *quà* deduction, erroneous. The rule may be similar to it, but it rests on other grounds, which Mr. Clode does in fact state correctly.

The third fault we approach with diffidence: for possibly the "subject" may be misapprehended by us. It has reference to the broad statement that "the subject cannot sue by petition for a tort"; but we must state what we conceive to be Mr. Clode's fault with considerable moderation. We think, not that the statement is inaccurate (999 lawyers out of every 1,000 would say the same thing), but that he has accepted the proposition a

little too readily. It is an important point, and the current of authority is all one way, but we should nevertheless like to see the other side of the question fairly stated. It must be remembered that *Thomas v. The Queen* was a great step forward. The judgment of Blackburn, J., declared one deeply-rooted opinion to be fallacious; it admitted that the petition might be brought for unliquidated damages for breach of a contract. It seems to us conceivable that *Feather v. The Queen* may be some day overruled, and the Canadian case, *The Queen v. McLeod*, be declared bad law. Many of Lord Blackburn's arguments would support such a contention; and the principle which underlies the whole subject, that the Petition may be brought in, and was originally confined to, cases for the recovery of property, seems expressly to recognise the right to petition in respect of some torts. We refer only to the torts of the Sovereign's agents, done within the scope of their employment. To say, in such a case, that "to authorise a wrong to be done is to do a wrong; and the King can do no wrong," is to invoke a fallacious explanation of the cases where a master is not liable for his servants' torts. The injustice of the Canadian decision must be apparent to all who do not deliberately hide themselves in a maze of technicalities. Possibly, in the Dominion Parliament, the "Member for Things in General" has not yet taken unto himself a seat. But should a similar case ever arise in England, and should it be decided in a similar way by the House of Lords, our own representatives of that type will of a surety be on their legs asking questions; and, on this occasion, if on no other, they will be doing their fellow-countrymen good and laudable service.

A Treatise on the Law and Practice relating to Joint Stock Companies under the Acts of 1862-1883, with Forms and Precedents. By C. E. H. CHADWYCK HEALEY, Barrister-at-Law. Second and Enlarged Edition. Maxwell and Son. 1886.

The large and compendious volume which Mr. Chadwyck Healey has given to the public by way of a Second Edition is the result of much honest labour assisted by a ripe judgment, and constitutes a really valuable addition to our legal library. The method on which the book is constructed leaves little to be desired, the running commentary on the law, the progress of which is neither let nor hindered by the intrusion of the

sections of the statute, being especially valuable. This commentary, coming as it does from a lawyer who had long mastered in practice the details and intricacies of Company Law, is one of the safest guides through those details and intricacies which we have as yet come across. The numerous Forms will be especially valuable to Solicitors.

One or two points, however, we should have liked to have seen treated with a little more fulness. First, as to the right to use the name of the company in actions against directors for malfeasance. We do not think the information on this head is quite complete. When is the leave given? What relief may be sought when the leave is given? What security is required? Unless we are mistaken, the book does not furnish answers to these not unimportant questions. Again, the whole question as to Foreign Corporations, and the powers over them which the English Courts arrogate to themselves deserves the fullest consideration in the present day; but Mr. Healey gives no sound information on the subject. The case of *re Matheson Bros.* (27 Ch. D. 225) is far too important a decision to be summarised in four or five lines. These are minor defects, however, which can be remedied in the next edition; and, looking at the work as a whole, we cordially recommend it to both branches of the Profession.

The Law of Distress, with an Appendix of Forms, &c. By ARTHUR OLDHAM and A. LA TROBE FOSTER, Barristers-at-Law. Stevens and Sons. 1886.

As the authors truly observe, the Law of Distress is a dry and technical subject, in which, more perhaps than in any other, ancient and most musty law is perpetually cropping up. In so far as such a subject could be made interesting, which we much doubt, Messrs. Oldham and Foster have succeeded in making it so: their style is lucid, and their statements of the effect of decisions are accurate. Lord Halsbury, it is said, intends to codify Sheriff Law: we can only hope his Lordship will also turn his attention to the Law of Distress. Should he do so, the work before us will undoubtedly be of considerable assistance in alleviating his labours, as it covers the whole ground, down to and including Distress for Poor and Highway rates, and for the enforcement of orders and convictions of Justices.

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Quarterly Digest

OF
ALL REPORTED CASES,
IN THE
Law Reports, Law Journal Reports, Law Times
Reports, and Weekly Reporter,
FOR AUGUST, SEPTEMBER, AND OCTOBER, 1886,
By F. T. PIGGOTT, M.A., LL.M., of the Middle Temple,
Barrister-at-Law.

Administration :—

- (i.) **Ch. D.**—*Executor—Money Paid on bond fide Construction of Will.*—An executor who has *bond fide* paid away money on a mistaken construction of a will is liable to refund it with interest.—*Powell v. Hulkes*; *re Hulkes*, 55 L.T. 209; 34 W.R. 733.
- (ii.) **Ch. D.**—*Insolvent Estate of Deceased Partner—Joint Creditor—Priority—Interest.*—The joint estate of a firm down to the death of one of the partners, the assets of the bank as carried on afterwards by the survivor down to his bankruptcy, and the separate estate of the survivor, were administered in bankruptcy. There were also administration actions with regard to the estate of the deceased partner. Twenty shillings in the £ was paid to the joint and separate creditors of the partners: the surplus assets were not enough to satisfy all the interest on both joint and separate debts: *Held*, the separate creditors were entitled to take their interest in priority to the joint creditors. In ascertaining the amount due, dividends received out of the estate ought to be treated as ordinary payments on account, to satisfy first the interest due on the date of the dividend, and then to reduce the principal.—*Whittingstall v. Grover*, 55 L.T. 213.
- (iii.) **P. D.**—*Limited Grant—Property Abroad—Amendment.*—A grant of administration was made limited to property in England. Deceased possessed foreign government stock, and the foreign Court refused to sanction the sale. The grant was amended by stating the gross value of the estate, the amount transmitted to England, and of the revenue.—*In the Goods of Henley*, 55 L.J. P. 61.
- (iv.) **P. D.**—*Presumption of Death—Insurance Company.*—Where the estate of a person whose death the Court was asked to presume consisted in part of a policy on his life, the Court ordered notice of the application to be given to the Insurance Company.—*In the Goods of Barber*, L.E. 11 P.D. 78.

- (i.) **Ch. D.**—*Shares in Company—Issue of New Stock—Profit arising from Sale—Capital or Income.*—Shares in a company were bequeathed on trust for wife for life, and subject thereto they were to form part of the residue. The company increased its capital by issuing fresh stock which it offered to the shareholders. A., under a power of attorney from the trustee who was abroad, took up the new shares in his own name and with his own money: In an action for administration of the testator's estate an order was made on A.'s executor, under which the new shares were sold and the balance of the proceeds, after the repayment of the amount paid for the stock and interest and deducting dividends received by A., was paid into court to the credit of the action. *Held* that the balance represented capital, and the widow was entitled to the income of it for life.—*Sanders v. Bromley, re Bromley*, 55 L.T. 145.
- (ii.) **Ch. D.**—*Transfer of Actions Pending in other Divisions—Ord. 49.*—An order for the transfer to the judge before whom an administration action is pending of actions against the executor should not be made by the order for administration.—*Poole v. Poole; re Poole*, 55 L.T. 56.
- See Practice*, p. 14, viii.

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- (iii.) **C. A.**—*Revocation of Submission—Jurisdiction of Arbitrator.*—An arbitrator *held* to have jurisdiction to hear evidence in order to enable him to determine whether the removal of a certain swampy soil came within the true meaning of a contract for excavation, so as to be performable at the contract prices.—*Kirk v. East and West India Dock*, 55 L.T. 245.

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- (iv.) **Ch. D.**—*Lien—Deposit to Secure Advances.*—A man had three accounts open at a bank. A policy for £5,000 was deposited charged with advances to him, not exceeding £4,000: at his death he owed the bank more than £4,000. *Held* the bankers' general lien for the excess was negatived by the express charge given by the deceased.—*Strathmore v. Vane; re Bowes*, 55 L.T. 260.

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- (v.) **C. A.**—*Appeal—Security for Costs—Special Circumstances.*—The deposit paid by a bankrupt on entering a bankruptcy appeal was ordered to be increased, on the ground that he had been already engaged in protracted and uniformly unsuccessful litigation with the respondents respecting the matter in question.—*Re McHenry*, L.R. 17 Q.B.D. 351; 55 L.J. Q.B. 496.
- (vi.) **Ch. D.**—*Elegit—Delivery in Execution.*—An execution against lands is "completed by seizure" within Bankruptcy Act, 1883, s. 45, sub-s. 2, as soon as the sheriff has delivered the lands to the creditor under a writ of elegit, though a receiving order is afterwards made before the sheriff makes a return to the writ.—*Re Hobson*, 55 L.J. M.C. 754; 55 L.T. 255; 34 W.R. 786.
- (vii.) **C. A.**—*Married Woman—Separate Property—General Power of Appointment.*—Decision of Q. B. D. (*see* Vol. 11, p. 108, iv.) reversed.—*E. p. Gilchrist, re Armstrong*, L.R. 17 Q.B.D. 521.
- (viii.) **C. A.**—*Notice—Final Judgment—Balance Order.*—A balance order made on a contributory is not a final judgment within Bankruptcy Act, 1883, s. 4, sub-s. 1 (g), and a bankruptcy notice cannot be issued in respect of it.—*E. p. Grimwade, re Tennent*, L.R. 17 Q.B.D. 357; 55 L.J. Q.B. 495.

- (i.) **C. A.**—*Notice—Judgment against Firm*.—A judgment against a firm cannot be made the subject of a bankruptcy notice under section 4, sub-section 1 (g) against a partner against whom execution could not, under Ord. 42, r. 10, have issued on the judgment without leave.—*E. p. Ide; re Ide*, 55 L.J. Q.B. 484.
- (ii.) **H. L.**—*Official Receiver—Power of Sale*.—Decision of C. A. (*re Parker e. p. Board of Trade*) (see Vol. 10, p. 90, vi.) affirmed.—*Turquand v. Board of Trade*, L.R. 11 App. Ca. 286; 55 L.J. Q.B. 417; 55 L.T. 30
- (iii.) **C. A.**—*Receiving Order—Order for Committal—Damages in Divorce Suit—Judgment Creditor*.—In a divorce suit the co-respondent was ordered to pay the amount of the damages into Court, and a further order was made for him to pay the money to the husband for settlement on the children. On failure to pay, held the husband was not a judgment creditor within Bankruptcy Act, 1883, s. 103, sub-s. 5, but that an order could be made for payment by instalments under Debtors Act, 1869, s. 5.—*E. p. Fryer; re Fryer*, 55 L.J. Q.B. 478; 55 L.T. 276; 34 W.R. 766.
- (iv.) **C. A.**—*Trustee—Unreasonable Rejection of Proof—Judgment under Order by Consent*.—The trustee ordered to pay costs personally where he had rejected a proof unreasonably: the fact that he had acted under the direction of the Committee of Inspection made no difference. The proof rejected was in respect of a judgment entered under a judge's order by consent, on the grounds that it had not been filed, and was, therefore, void under Debtors Act, 1869, s. 27. The invalidity of the judgment did not affect the right to prove for the debt for which the action had been brought.—*E. p. Brown; re Smith*, L.R. 17 Q.B.D. 486.
See Husband and Wife, p. 8, vi. Partnership, p. 12, i. Practice, p. 13, x. Solicitor, p. 18, ii. Trustee, p. 19, v.

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- (v.) **C. A.**—*Drawn against Firm—Acceptance by One Partner*.—A bill drawn on a firm was accepted by a partner in the firm named, he added his own underneath: Held, the acceptance was for the firm, and the partner was not separately liable.—*Edwards v. Barnard; re Barnard*, L.R. 32 Ch. D. 447; 55 L.T. 40; 34 W.R. 782.

Bill of Sale:—

- (vi.) **C. A.**—*Definition—Document accompanying Pledge—Power of Sale*.—A document signed by the borrower of money at the time of depositing goods as security for the loan, and containing the terms of repayment and a power of sale, is not a bill of sale within the Act.—*E. p. Hubbard; re Hardwick*, 55 L.J. Q.B. 490; 34 W.R. 790.
- (vii.) **Ch. D.**—*Payment by Instalments—Forcible Seizure*.—By a bill interest was reserved "at the rate of one shilling in the pound per month" redemption was provided for on payment of the principal secured by monthly instalments, and power was given to the grantee in the event of his right of seizure arising to enter and remain upon, and if necessary, break doors to obtain access to the chattels. Held not to offend against the statute.—*Lumley v. Simmons*, 55 L.J. Ch. 759; 34 W.R. 759.
- (viii.) **Q. B. D.**—*Power of Sale on Default*.—A provision that a purchaser shall not be bound to enquire whether the alleged default, in consequence of which the power of sale is exercised, has taken place, voids the bill of sale as substantially deviating from the form in the schedule to the Act of 1882.—*Blaiberg v. Parsons*, L.R. 17 Q.B.D. 397.

- (i.) **Q. B. D.**—*Validity—Covenant for further Assurance.*—A covenant by grantor for further assurance by himself and every other person claiming through him is not in contravention of the form in the schedule to the Act.—*E. p. Rawlings ; re Cleaver*, 55 L.J. Q.B. 455 ; *e. p. Consolidated Credit Co.*, 34 W.R. 760.
- (ii.) **Q. B. D.**—*Validity—Covenant for Maintenance of Security.*—A covenant not to permit the chattels to be destroyed or deteriorate except by reasonable wear and tear, and to replace them when necessary, with a power of seizure, and a declaration that the covenant was necessary for maintaining the security. *Held*, it was not necessary and the bill therefore void.—*Furber v. Cobb*, L.R. 17 Q.B.D. 459 ; 55 L.J. Q.B. 487.
- (iii.) **Q. B. D.**—A provision in a bill that if mortgagor did not pay rent, rates, and taxes, &c., within seven days after they became due, the mortgagees might pay them and recover them in the same way as the principal sum : *Held* not in accordance with the form in schedule, and the bill void.—*Bianchi v. Offord*, L.R. 17 Q.B.D. 484 ; 55 L.J. Q.B. 486.

Bridge.—*See Highway*, p. 8, iv.

Charity:—

- (iv.) **Ch. D.**—*Failure of Gift—Cy près—Lapses.*—A bequest for almshouses for certain classes of people was declared to be made in the hope that some one else would endow them. The trustees could get neither a site nor an endowment. On a petition that a scheme might be settled for the application of the fund *cy près* : *Held* there was no general gift to charity ; that the benefits intended were all relative to the general gift, and that, having failed, the fund lapsed into the residue.—*Re White's Trusts*, 55 L.J. Ch. 701 ; 55 L.T. 162 ; 34 W.R. 771.
- (v.) **C. A.**—*Mortmain—Mortgage of Harbour Dues.*—Decision of Ch. D. (*see* Vol. 11, p. 14, i.) reversed.—*Martin v. Lacon ; re Christmas*, 55 L.T. 197 ; 34 W.R. 779.
- (vi.) **H. L.**—*Scotch Charitable Trust—Commingleing of Different Funds.*—Pursuers in an *actio popularis* in re a public trust, have no right to demand a partial decree which will leave unsettled matters affecting the future administration of the charity. If the trustees cannot carry out the main purpose of the trust, they ought to apply to the Court for directions. When two trust funds, bequeathed for the same charity, are *bond fide* intermixed by the same trustees, in an *actio popularis*, the Court ought to refuse a decision until the whole circumstances are before it, in order to enable it to give a final decision in the interest of the charities.—*Andrews v. McGuffog*, L.R. 11 App. Ca. 313.
See Maintenance, p. 10, iv.

College of Arms.—*See Will*, p. 21, vi.

Company:—

- (vii.) **Ch. D.**—*Debenture Secured on Company's Goods.*—A company issued debentures which purported to confer the benefit of an indenture charging present and future chattels of the Company, which were vested in trustees on trust to enter and sell in case of default. Neither debentures nor indenture were registered. *Held*, assuming the indenture void, the debentures, being contracts in equity to charge the money lent on the chattels comprised in it, were valid and excepted from the Bills of Sale Act, 1882, by section 17.—*Ross v. Army and Navy Hotel Co.*, 55 L.J. Ch. 697 ; 55 L.T. 146.

- (i.) **Ch. D.**—*Director—Expenditure—Ultra Vires—Proxies—Costs of Prosecutions for Libels on Directors.*—The funds of a company ought not to be used in any way in respect of the proxy papers which tend to influence the votes of the shareholders; nor in any case for the postage of the reply. The costs of actions for libel ought only to be charged to the company when the libel directly affects the company.—*Studdert v. Grosvenor*, 55 L.J. Ch. 689; 55 L.T. 171; 34 W.R. 754.
- (ii.) **Ch. D.**—*Petition for Reduction of Capital—Foreign Agencies.*—Notice of a petition for reduction of capital presented by a company with numerous agencies all over the world ordered to be extensively advertised where the agencies existed.—*Re London and Provincial Ins. Co.*, 55 L.J. Ch. 690; 55 L.T. 55.
- (iii.) **C. A.**—*Promoter—Costs—Higher Scale—Ord. 45, r. 9.*—Decision of Ch. D. (see Vol. 11, p. 76, ii.) reversed in part.—*Lydney Iron Co. v. Bird*, 34 W.R. 749.
- (iv.) **Ch. D.**—*Promoter—Fiduciary Relation—Secret Profit.*—The purchasers of a mine formed a company to which they sold it at a considerable profit. The agreement was ratified by the articles and the purchasers were made directors. The whole of the capital was subscribed for by the vendors, they having previously sold the greater part of the shares on the market: they made no disclosure of their original purchase. The company went into liquidation; and the lessor in an action of ejectment recovered possession of the mine: *Held* actions by the company to recover the difference between the buying and selling price must be dismissed, as the vendors were not in a fiduciary position when they purchased.—*Ladywell Mining Co. v. Brookes; The same v. Huggons*, 55 L.T. 284.
- (v.) **Ch. D.**—*Winding-up—Distress by Landlord having Right of Proof.*—A company, the lessees of premises, on going into liquidation, sold the lease to another company. The landlord entered into an agreement with the purchaser that they should pay arrears due and accruing due; no assignment was executed. *Held*, the landlord could distrain for arrears due before the liquidation.—*Re New City Constitutional Club; e. p. Pursell*, 55 L.J. Ch. 704; 54 L.T. 864.
- (vi.) **Ch. D.**—*Winding-up—Foreign Company.*—Under Companies Act, 1862, s. 199, the court may wind up a company registered in Australia, but which has a branch office, assets, and liabilities in England. Where a winding-up order had already been made abroad the English liquidator was directed not to act without the judge's direction.—*Re Commercial Bank of South Australia*, 55 L.J. Ch. 670.
- (vii.) **C. A.**—*Winding-up—Separate Action against Company—Discovery.*—An action was commenced by a contributory for specific performance on an independent agreement with the company. He obtained an order in the winding-up, under Companies Act, 1862, s. 115, for the examination of the directors. *Held*, the powers under that section ought not to be exercised except for the purpose of the winding-up; and the examination which would only have benefited the plaintiff was stayed till after the trial of the action.—*Re Imperial Continental Water Co.*, 55 L.T. 47.

See Administration, p. 2, i. Practice, p. 14, ix. Water, p. 20.

Compensation:—

- (viii.) **Ch. D.**—*Lands Clauses Act, 1845, s. 92—Part of Manufactory.*—In one house a firm produced a blended tea sold under their own trade-mark; in another the tea was packed. *Held*, there was no manufactory within the Act; and even if there were, the two houses were used for separate

objects, and the Metropolitan Board of Works, who were taking one house, under their compulsory powers, could not be compelled to take the whole.—*Bennington v. Metropolitan Board of Works*, 54 L.T. 837.

- (i.) **Ch. D.**—*Payment of Purchase-Money into Court—Transfer to Credit of Suit—Re-investment.*—The purchase-money of lands taken by the Metropolitan Board of Works was paid into Court and invested in Consols, and afterwards transferred to the credit of a suit to an account not intitled in the matter of this special Act, but containing a reference to the Board. Held, the Court could make the Board pay the costs of the re-investment.—*Drake v. Greaves*, 34 W.R. 757.
- (ii.) **Ch. D.**—*Tenant for Life and Remainderman—Mines—Wrongful Working—Compensation Money.*—Coal mines under certain lands were devised on trust for A. for life without impeachment of waste, then for B. for life without impeachment of waste, with limitations over. During A.'s life, and afterwards, the owners of neighbouring collieries inadvertently worked coal under the devised land, and afterwards paid compensation for it. A railway passed over the land; the lessees, after A.'s death, gave notice of intention to work the coal; the company gave a counter notice that it was necessary for the support of the railway; they then paid compensation, out of which a sum was set apart as paid in respect of the lessor's interest: Held the money paid by the coal-owners for coal worked by mistake, during the lives of A. and B. respectively, belonged to their respective estates; and as to the sum paid by the railway, as it was small and could have been got during B.'s life, he was entitled to it.—*Gumlen v. Lyon; re Barrington*, 55 L.T. 87.

See Railway, p. 15, vi.

Contract :—

- (iii.) **Ch. D.**—*Agreement in Consideration of Marriage—Memorandum in Writing—Statute of Frauds.*—The memorandum of an agreement made in consideration of marriage must shew in fact, or by inference, the essential terms of a contract, e.g., that the marriage is the consideration. It is not sufficient to shew by parol evidence that a marriage was in contemplation between the parties.—*Vincent v. Vincent*, 55 L.T. 181.
- (iv.) **Ch. D.**—*Invalid Demand—Forfeiture.*—A demand, which is inaccurate, for rent under an agreement, is not a demand on which a forfeiture can be founded.—*Jackson v. Northampton Tramways Co.*, 55 L.T. 91.

See Practice, p. 13, ix.

County Court :—

- (v.) **Q. B. D.**—*Special Case—Appeal to Q. B. D.*—All appeals from a County Court to Q. B. D. must be by notice of motion under Ord. 59, rr. 9 and 10.—*R. v. Kettle*, 55 L.J. Q.B. 470; *R. v. Worcester County Court Judge*, 54 L.T. 875; an extension of time refused where wrong practice had been adopted.—*Brown v. Dorset*, 34 W.R. 776.

See Elections, p. 8, ii.

Criminal Law :—

- (vi.) **Q. B. D.**—*Committal to Prison—Unqualified Person Acting as Solicitor—Criminal Prisoner.*—A person committed to prison under 6 & 7 Vict., c. 73, s. 32, and 23 & 24 Vict., c. 127, s. 26, for acting as a solicitor, though not duly qualified, is not a "criminal prisoner" within 28 & 29 Vict., c. 126, s. 4, but a person imprisoned within 40 & 41 Vict., c. 21, s. 41, and he is therefore entitled to be treated as a first-class misde-meanant.—*Osborne v. Milman*, L.R. 17 Q.B.D. 515.

- (i.) **Q. B. D.**—*Obtaining Property by False Pretences—Pledge to Innocent Party—Sale by him—Restitution.*—Under 24 & 25 Vict., c. 96, s. 100, the Court may order restitution of the proceeds of goods on the conviction of a fraudulent pledgor; but only if the proceeds are in the hands of the convict or of an agent who holds them for him.—*R. v. Justices of Central Criminal Court*, L.R. 17 Q.B.D. 598.

Death.—*See Administration*, p. 1, iv. *Divorce*, p. 7, iv. *Practice*, p. 13, x.

Deeds:—

- (ii.) **Q. B. D.**—*Registration—Middlesex Registry—Fees.*—Under 7 Anne, c. 20, the registrar is only entitled to charge one shilling for registering a memorial of under 200 words as prepared by the person registering, although the official has added words in the margin bringing the number over that amount.—*Munton v. Lord Truro*, 55 L.T. 293.

Divorce:—

- (iii.) **P.**—*Assessment of Damages.*—In assessing damages against a co-respondent, the jury is not to punish him, but only to give compensation for the loss sustained by the husband, if this loss has been caused by the action of the co-respondent. The co-respondent's means are not to be considered.—*Keyse v. Keyse*, L.R. 11 P.D. 100; 55 L.J. P. 54; 34 W.R. 791.
- (iv.) **C. A.**—*Death of Petitioner before Decree Absolute.*—Where the petitioner has died after decree nisi for dissolution, but before decree absolute, the suit cannot be revived by his representatives.—*Stanhope v. Stanhope*, L.R. 11 P.D. 103; 55 L.J. P. 36; 54 L.T. 906.
- (v.) **P. D.**—*Judicial Separation—47 & 48 Vict., c. 68, s. 5.*—Where a husband refused to comply with a decree ordering him to resume cohabitation, the Court granted a decree of judicial separation, although two years had not elapsed.—*Harding v. Harding*, L.P. 11 P.D. 111; 55 L.J. P. 59.
- (vi.) **P. D.**—*Variation of Settlements.*—Wife's income under settlement £1,050 per annum; husband's income £800 per annum, part arising from money received from wife, the respondent; no children. Trustees of settlement ordered to pay the husband £300 per annum during joint lives of husband and wife.—*Farrington v. Farrington*, L.R. 11 P.D. 84.
- (vii.) **H. L.**—*Wife's Bill—Adultery and Cruelty.*—In passing a Divorce Bill relating to Ireland the H. L. will accept the same evidence which enables the Divorce Court to pronounce a decree for an English dissolution.—*Westropp's Divorce Bill*, L.R. 11 App. Ca. 294.

See Bankruptcy, p. 3, iii.

Easement:—

- (viii.) **Ch. D.**—*Ancient Lights—Alteration of Building—Injunction or Damages—Lord Cairns' Act, s. 2.*—On motion for interlocutory injunction to restrain interference with light and air, the defendant gave an undertaking to pull down any building thereafter erected or proceeded with, and to abide any order as to damages. No order was made on the motion. The buildings were completed: at the trial held a proper case for a mandatory injunction, and not for damages in lieu, under the discretion given by the Act.—*Greenwood v. Hornsey*, 55 L.T. 135.
- (ix.) **C. A.**—*Artificial Watercourse—Prescription—Landlord and Tenant.*—Lease from defendants to plaintiffs of coal under C. estate for 50 years; among other powers one to make drains and other acts for draining the mine and any others they might become lessees of. They then leased a mine under O. estate and made a drain without leave, diverting natural stream on C., bringing it down to O.; defendant's agent approved of the

work. Plaintiffs then became owners in fee of O. When the lease expired defendants stopped the drain and diverted the water, to which the plaintiffs claimed a right of prescription. *Held*, the right to the water expired with the lease, and that there was no enjoyment of it as of right.—*Chamber Colliery Co. v. Hopwood*, L.R. 32 Ch. D. 549.

- (i.) **C. A.**—*Grant—Extinguishment—Merger*.—Decision of Ch. D. (see Vol. 11, p. 115, iv.) affirmed.—*Dynevor v. Tennant*, 34 W.R. 737.

See *Railway*, p. 15, vi.

Elections:—

- (ii.) **C. A.**—*Returning Officer's Charges—Application to County Court Registrar*—38 & 39 Vict., c. 84, s. 4.—Decision of Q. B. D. (see Vol. 11, p. 116, viii.) affirmed.—*R. v. Bloomsbury County Court Judge*.—55 L.J. Q.B. 443.

Estoppel:—

- (iii.) **C. A.**—*Rectification—Res Judicata—Money paid under Compulsion of Law*.—Decision of Ch. D. (see Vol. 11, p. 80, vi.) reversed.—*Caird v. Moss*, L.R. 33 Ch. D. 22.

Factor.—See *Power of Attorney*, p. 13, ii.

Highway:—

- (iv.) **Q. B. D.**—*Bridge—Liability of County to Repair*.—The owners of land on one side of a river made a road across it, and built a bridge connecting it with an existing highway on the other side. Both bridge and road were simultaneously dedicated to the public. *Held*, the bridge had not been erected in an existing highway, and the county was not liable for its repair, there being no evidence of acquiescence on its part.—*R. v. Inhabitants of Southampton*, L.R. 17 Q.B.D. 424; 55 L.J. M.C. 158.

- (v.) **Q. B. D.**—*Expenses of—Highway District—Rural Sanitary District—Coincidence of Areas—Subtraction of Parish*.—The provisions of 25 & 26 Vict., c. 61, s. 39, are not repealed by 41 & 42 Vict., c. 77, ss. 3, 4. Therefore although by an order under this Act the area of a highway district may have become coincident with the area of a rural sanitary district, and the rural sanitary authority have been duly authorised to exercise the powers of a highway board, they cannot enforce contribution to the expenses of the board from a parish which has been duly subtracted from the district by an order under the previous act.—*Shappey Guardians v. Elmley Overseers*, L.R. 17 Q.B.D. 365.

Husband and Wife:—

- (vi.) **Ch. D.**—*Equity to Settlement—Bankruptcy of Husband*.—In an action for equity to a settlement where the husband was an undischarged bankrupt, but was living with his wife and contributed to her support out of his earnings, two-thirds only of the wife's fund was directed to be settled.—*Callow v. Callow*, 55 L.T. 154.

- (vii.) **C. A.**—*Postnuptial Settlement—Valuable Consideration*—27 Eliz., c. 4.—Decision of Ch. D. (see Vol. 10, p. 68, v.) affirmed.—*Schreiber v. Dinkel*, 54 L.T. 911.

See *Bankruptcy*, p. 2, vii. *Divorce*, p. 7. *Infant*, p. 8, viii.

Infant:—

- (viii.) **Ch. D.**—*Married Woman—Ward of Court—Reversionary Interest—Validity of Settlement*.—An infant ward of Court married without leave; she was entitled to a reversionary interest under a will. A

settlement was executed by the husband and wife and sanctioned by the Court: no order was made under the Infants' Settlements Act, 1855. It was treated as binding by the wife in certain applications to the Court. The marriage being dissolved, she sought to have the settlement declared not binding on her: *Held*, it was valid, and had been confirmed by the lady's acts.—*Buckmaster v. Buckmaster*, 55 L.T. 279.

- (i.) **Ch. D.**—*Suing by Next Friend—Costs.*—Party and party costs only can be allowed out of a fund to which an infant, who has been suing by his next friend, is entitled in reversion.—*Damant v. Hennell*, 55 L.T. 182; 34 W.R. 774.

See Will, p 21, ii.

Injunction:—

- (ii.) **Ch. D.**—*Trade Label—Descriptive Title—Collateral Representation.*—The right to use a certain title for goods had been established by H. L. in litigation between A. and B. B. then sold the goods with a statement "this is the only genuine brand:" *Held* A. entitled to an injunction to restrain B. from doing so.—*Liebig's Meat Co. v. Anderson*, 55 L.T. 206.

See Easement, p. 7, viii.

Insurance.—*See Administration*, p. 1, iv.

Interest.—*See Administration*, p. 2, i. Principal and Agent, p. 15, iv.

Interpleader:—

- (iii.) **Q. B. D.**—*Goods taken in Execution—Title of Third Party.*—In an interpleader issue between an execution creditor and a claimant the creditor may defeat the claim by establishing the title of a third party.—*Richards v. Jenkins*, L.R. 17 Q.B.D. 544; 55 L.J. Q.B. 435; 34 W.R. 739.

Landlord and Tenant:—

- (iv.) **H. L.**—*Assent of Landlord to Assignment of Lease—Contingent Damage—Winding-up Company.*—Where a lease is not assignable without the landlord's assent, the fact that he did not object to the assignees taking possession, is not of itself sufficient to imply his recognition of them. The lessor may, where the lease has been assigned without his consent, obtain an interdict against the liquidator of a company, the lessee, dividing the surplus among the shareholders until a provision is made to meet his future contingent claims.—*Elphinstone v. Monkland Iron Co.*, L.R. 11 App. Ca. 332.
- (v.) **Ch. D.**—*Chattel Found Beneath Surface—Reservation of Minerals.*—A lease reserved minerals, but gave lessor no power of entry for winning them. During excavations, an ancient boat, not fossilised, was discovered. *Held*, whether it was a mineral, or a chattel, or part of the soil in which it was embedded, it belonged to the lessor.—*Elwes v. Brigg Gas Co.*, 55 L.J. Ch. 734.
- (vi.) **Q. B. D.**—*Distress—Cost of Levy—Bailiff.*—The bailiff of the County Court is not the "person making any distress" within the Agricultural Holdings Act, 1883, s. 49, and is therefore not entitled to the percentage allowed by that section and schedule 2.—*Coode v. Johns*, 55 L.J. Q.B. 475; 55 L.T. 296.

See Company, p. 5, v. *Easement*, p. 7, ix.

Libel :—

- (i.) **C. A.**—*Privilege—Judgment of Judge—Publication.*—The publication in pamphlet form of the judge's judgment simply is privileged, even though there is an imputation against the plaintiff's character: the privilege may be rebutted by malice.—*Macdougall v. Knight*, 55 L.J. Q.B. 464; 55 L.T. 274; 34 W.R. 727.

See Company, p. 5, i. *Injunction*, p. 9, ii.

License :—

- (ii.) **Q. B. D.**—*Transfer—Jurisdiction of Justices to Refuse.*—Where application is made at Special Sessions for the transfer of a beer license in force on, and continuously, since May 1, 1869, the justices discretion is limited by the four grounds given in Beerhouse Act, 1869, s. 8.—*Simonds v. Blackheath Justices*, 55 L.J. M.C. 166.

Lunatic :—

- (iii.) **C. A.**—*Mortgage of Estate—Covenant on Behalf of.*—The Court, under Lunacy Regulation Act, 1853, s. 116, authorised the Committee to concur in a mortgage of realty, which was liable to pay the ancestor's debts; the lunatic being entitled to a moiety, it was made liable only to a moiety of the debts: covenants on behalf of the lunatic were forbidden.—*Re Fox*, L.R. 33 Ch. D. 37; 55 L.T. 39.

Maintenance :—

- (iv.) **C. A.**—*Action for—Charity.*—In an action of maintenance it is a good defence that defendant assisted the party "maintained" out of charity, believing him to be oppressed: a full enquiry into the circumstances is not necessary.—*Harris v. Brisco*, L.R. 17 Q.B.D. 504; 55 L.J. Q.B. 423; 55 L.T. 14; 34 W.R. 729.

Malicious Prosecution :—

- (v.) **Q. B. D.**—*Application for Search Warrant—Reasonable Cause for Suspicion.*—Under section 10, Criminal Law Amendment Act, 1885, the Justice has a judicial act to perform, and his decision that there is a reasonable cause for suspicion is a protection to a person who *bonâ fide* applies for a search warrant, and is a defence to an action for maliciously causing the warrant to issue.—*Hope v. Evered*, L.R. 17 Q.B.D. 338; 55 L.J. M.C. 146; 34 W.R. 742.
- (vi.) **H. L.**—*Reasonable and Probable Cause—Onus of Proof.*—Decision of C. A. (*see* Vol. 9, p. 9, v.) affirmed.—*Abrath v. N. E. Ry. Co.*, L.R. 11 App. Ca. 247; 55 L.J. Q.B. 457; 55 L.T. 63.

Market :—

- (vii.) **Q. B. D.**—*Validity of Bye-Law—Restraint of Trade.*—A bye-law made under a local Act for regulating markets is not unreasonable or in restraint of trade if it sets apart a part of the market for sale by wholesale only with a penalty for selling by retail.—*Strike v. Collins*, 55 L.T. 182.

Marriage :—

- (viii.) **P. D.**—*Decree of Foreign Court—Presumption of Jurisdiction—Personal Disability—Remarriage in England.*—Parties having been divorced by a Colonial Court, the English Court presumed that that Court had jurisdiction. A personal disability by the foreign law against remarriage

until the injured party had also remarried, *held*, only to be operative within the foreign country: and as the decree absolutely dissolved the marriage, a remarriage in England was good.—*Scott v. A.-G.*, 55 L.J. P. 57.

See Contract, p. 6, iii.

Master and Servant :—

- (i.) **Q. B. D.**—*Employers Liability Act*, 1880, s. 1, sub-s. 1—*Defect in Condition of Ways or Plant*.—A ladder was placed down a well in a building intended for a loft: it had been formerly used for throwing rubbish down: a plank was thrown down and struck the plaintiff as he was coming up the ladder: *Held* not within section 1, sub-section 1 of the Act.—*Pegram v. Dixon*, 55 L.J. Q.B. 447.
- (ii.) **Q. B. D.**—In a brewery a passage, only three feet wide, ran between a cooling vat and a boiling vat: neither vat was fenced. In moving a board from under the boiling vat the plaintiff fell into the cooler, the board giving way suddenly. *Held* not within the section.—*Thomas v. Quartermaine*, L.R. 17 Q.B.D. 414; 55 L.J. Q.B. 439; 34 W.R. 741.

Metropolis.—*See Poor Law*, p. 18, i.

Middlesex Registry.—*See Deeds*, p. 7, ii.

Minerals.—*See Compensation*, p. 6, ii. Landlord and Tenant, p. 9, v. Railway, p. 15, vi.

Mortgage :—

- (iii.) **Ch. D.**—*Deposit—Equitable Mortgagee—Deed*.—Where an equitable mortgagee by deposit of a deed delivers it up to another by way of gift, with the intention of giving him the charge and the deed, that person cannot hold the deed as mortgagee.—*Shillito v. Hobson; re Richardson*, 55 L.J. Ch. 741.
- (iv.) **C. A.**—*Foreclosure*.—Where a receiver has received rents between the date of the certificate under a foreclosure judgment and the day fixed for redemption the mortgagee is not entitled to them except on the terms of bringing them into account as between mortgagee and mortgagor, and a fresh date must be fixed for redemption.—*Jenner-Fust v. Needham*, L.R. 32 Ch. D. 582; 55 L.J. Ch. 629; 55 L.T. 37.
- (v.) **C. A.**—*Residential Apartments—Mortgagee in Possession*.—In a mortgage of a block of residential apartments there was an assignment of the "rents and profits," and a power to the mortgagee to enter and "manage:" and a covenant to pay money expended by the mortgagees in so doing: the apartments were let out to tenants, some of whom were under an agreement as to a supply of food from a common kitchen. The mortgagees entered and managed the business. *Held*, in action for account by the second mortgagees, the first were entitled to be recouped losses out of rents and surplus proceeds of sale.—*Bumpas v. King*, 55 L.T. 190.

See Charity, p. 4, v. Lunatic, p. 10, iii. Trustee, p. 19, iv., vi.

Mortmain.—*See Charity*, p. 4, v.

Negligence.—*See Ship*, p. 17, i., viii.

Nuisance :—

- (vi.) **Q. B. D.**—*Local Government Acts—Abatement—Defective Construction of Structural Convenience*.—A notice under section 94, Public Health Act, 1875, was served on owner of premises requiring him to abate a

nuisance arising from the defective construction of a structural convenience, and to execute certain works. On the hearing of the summons on failure to comply, it was proved that the premises were leased for 21 years, with the usual covenants. *Held*, although the owner could not enter to execute the works without the tenant's permission, he had "made default," and the justices could make the necessary order.—*Parker v. Inge*, L.R. 17 Q.B.D. 585; 55 L.J. M.C. 149; 55 L.T. 300.

Partnership:—

- (i.) **Ch. D.**—*Bovill's Act*, ss. 1, 2, 5—*Loan to Trader—Share of Profits—Bankruptcy of Borrower*.—A. agreed to lend B., a merchant, a sum of money on his bond at 5 per cent. : A. was also to become a pupil clerk to learn the business for three years, receiving by way of salary half the net profits : the agreement was not to be construed as a partnership unless A. gave written notice of his desire at the end of the period. This agreement was subsequently altered to a monthly payment of interest at £20 per month in full satisfaction of all claims for interest or profit. In B's bankruptcy, *held*, the whole transaction was one contract and within sections 1 & 5 of Bovill's Act : and that there being no fresh loan at the time of the second arrangement A.'s claim must be postponed to those of the other creditors.—*Re Stone's trusts*, 55 L.T. 256.
- (ii.) **H. L.**—*Expiration of Term—Continuation of Business without Fresh Articles—Partnership at Will—Right to Determine*.—When partners continue to trade at the expiry of the articles without entering into fresh ones, the original contract is prolonged by tacit consent, and its conditions continue except such as are inconsistent with an implied term of the renewal. One of these terms is the right of each partner, when acting *bond fide* and not to obtain undue advantage, to determine the partnership instantly.—*Neilson v. Mossend Iron Co.*, L.R. 11 App. Ca. 298.

See Bankruptcy, p. 3, i. Bill of Exchange, p. 3, v. Practice, p. 15, iii.

Patent:—

- (iii.) **Ch. D.**—*Infringement—Costs of Particulars*.—On an application for a certificate that particulars are proper under Patents Act, 1883, s. 29, sub-s. 6, the Court must be satisfied that they are actually reasonable and proper; the evidence at the trial only can be received.—*Germ Milling Co. v. Robinson*, 55 L.T. 282.

Penalty:—

- (iv.) **H. L.**—*Penal and Liquidated*.—Where one lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification : but where the payments stipulated are made proportionate to the extent to which the contractors fail in their obligations, and are to bear interest from the date of the failure, they are liquidated damages.—*Elphinstone v. Monkland Iron Co.*, L.R. 11 App. Ca. 332.

Petition of Right:—

- (v.) **P. C.**—*Damages*.—Whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for liquidated damages whether the breach be occasioned by positive acts or by omissions of the Crown's servants.—*Windsor & Annapolis Ry. v. R.*, 55 L.T. 271.

Poor Law :—

- (i.) **Q. B. D.**—*Metropolis—Valuation Acts—Assessment Sessions—Appeal.*—The Assessment Committee of a union appealed under section 32 of *Metropolis Valuation Act, 1869*, to the general assessment sessions against the valuation list of the respondent parish, and against the total gross and rateable value appearing therein, on the ground that they were too low, and they shewed that certain special assessments were too low. *Held*, the appeal did not fall within section 33, and that Notices need not be served on the occupiers of the specified hereditaments.—*R. v. Metropolis Justices*, L.R. 17 Q.B.D. 394.

Power of Attorney :—

- (ii.) **Ch. D.**—*Construction—General Words—Authority to Mortgage—Factors Act.*—A power to “sell and convert into money” personal property, together with very general powers, does not authorise a mortgage of the property.—*Lewis v. Ramsdale*, 55 L.T. 179.

Practice :—

- (iii.) **C. A.**—*Affidavit of Documents—Land—Privilege.*—Decision of Ch. D. (*see Vol. 11, p. 125, v.*) reversed.—*Emmerson v. Ind*, 34 W.R. 778.
- (iv.) **P. C.**—*Appeal to J. C.—Point not Raised Below.*—Points not taken in the Court below cannot be taken on appeal.—*Corporation of Adelaide v. White*, 55 L.T. 3.
- (v.) **Q. B. D.**—*Assignment of Chose in Action.*—The executors under a will sent a residuary legatee a statement of accounts, shewing the balance due to him; he sent on the account to his daughter with an indorsement: “I hereby instruct the trustees to pay to my daughter the balance, &c.” Notice in writing was given to the executors: *Held*, a valid assignment.—*Harding v. Harding*, L.R. 17 Q.B.D. 442; 55 L.J. Q.B. 462; 34 W.R. 775.
- (vi.) **C. A.**—*Chancery Action—Claim under £10.*—An action for relief which, before the Judicature Acts would only have been given in Chancery, must now, as before, be dismissed if its subject-matter is less in value than £10.—*Westbury-on-Severn Sanitary Authority v. Meredith*, 55 L.J. Ch. 744.
- (vii.) **C. A.**—*Costs—Higher and Lower Scale—Ord. 65, r. 9.*—Although a case is important and difficult, and occupies considerable time at the hearing, it does not necessarily follow that costs will be given on the higher scale.—*Williamson v. North Stafford Ry.*, L.R. 32 Ch. D. 399.
- (viii.) **L. C. J.**—*Costs—Trial with Jury.*—Where an action is tried with a jury, the judge's discretion as to costs under Ord. 65, r. 1, was not intended to be subject to appeal.—*Huxley v. West London Ry.*; *Hughes v. Merrett*; *Wood v. Madge*, L.R. 17 Q.B.D. 373.
- (ix.) **Q. B. D.**—*Costs of Issue—Contract—Claim and Counter-claim.*—Where, on a reference of claim and counter-claim, the plaintiff is found entitled to less than £20, he is not entitled to the costs of the issue on which he has succeeded: and the fact that £60 has been found for the defendant on his counter-claim does not affect the question, nor take the case out of County Courts Act, 1867, s. 5.—*Ahrbecker v. Frost*, 55 L.J. Q.B. 477; 55 L.T. 264; 34 W.R. 789.
- (x.) **Ch. D.**—*Death of Defendant after Notice of Trial—Trustee in Bankruptcy—Official Receiver—Ord. 17, rr. 1-4.*—The defendant to an action, who was a trustee in bankruptcy, died after the action was set down for trial. The plaintiff made the executors and the official receiver parties: the receiver appeared but took no further steps. Notice was given that the action had been restored, but fresh notice of trial was not

given, and the receiver was not served with notice of motion for judgment. *Held*, he must be served in the usual way.—*Johnston v. English*, 55 L.T. 55.

- (i.) **C. A.**—*Discovery—Privilege—Solicitor and Client.*—Solicitor's privilege extends to the case of a solicitor being personally defendant and called on to answer interrogatories with respect to information obtained by him in confidence while acting as solicitor for a client in another action.—*Proctor v. Smiles*, 55 L.J. Q.B. 467.
- (ii.) **C. A.**—*New Trial—Verdict against Weight of Evidence.*—On application for new trial, the Judge's report that he was dissatisfied with the verdict is not binding, but deserves serious consideration.—*Webster v. Friederberg*, 55 L.J. Q.B. 403; 55 L.T. 295; 34 W.R. 729.
- (iii.) **C. A.**—*New Trial—Verdict against Evidence.*—A new trial ought not to be granted on the ground that the verdict was against the weight of evidence, unless it was one which the jury could not properly find.—*Webster v. Friederberg*, 55 L.T. 49.
- (iv.) **C. A.**—*Originating Summons—Appeal.*—An originating summons falls within the definition of an action in Judicature Act, 1873, s. 100, and the time for appealing is one year under Ord. 58, r. 15.—*Galland v. Burton*; *re Fawcitt*, 55 L.J. Ch. 568.
- (v.) **Ch. D.**—*Payment out of Court—Trustee Relief Acts—Fund exceeding £1,000.*—The generality of Ord. 55, r. 2, sub-section 1, is not qualified by sub-section 5. An application under Trustee Relief Acts for payment out of a fund to an applicant whose title depends merely upon proof of birth, should be by summons, though the fund exceeds £1,000.—*Re Broadwood*, 55 L.J. Ch. 646.
- (vi.) **Ch. D.**—*Perpetuation of Testimony—Default in Delivering Defence—Examination.*—Notwithstanding the default in delivery of defence, plaintiff obtained an order to proceed with examination of witnesses.—*Marquis of Bute v. James*, 55 L.J. Ch. 658; 55 L.T. 133; 34 W.R. 754.
- (vii.) **Q. B. D.**—*Security for Costs.*—A plaintiff corporation cannot be required to give security for costs on the ground that a receiver of its property has been appointed by the Court.—*Dartmouth Harbour Commission v. Mayor of Dartmouth*, 55 L.J. Q.B. 483; 34 W.R. 774.
- (viii.) **Ch. D.**—*Service out of the Jurisdiction—Administration Action.*—The testator was domiciled in Jersey; the persons interested under the will were in England, and also the bulk of the property; they commenced an action here for administration, and for the appointment of guardians; the trustees appointed under Jersey law, as well as the executors were in Jersey: leave was given to serve the writ upon them.—*Lane v. Robins*; *re Lane*, 55 L.T. 149.
- (ix.) **Q. B. D.**—*Service out of the Jurisdiction—Company with Registered Office in Scotland.*—An insurance company had a registered office in Scotland, and also agencies, and a chief office in England: *Held*, the company was not "ordinarily resident" within the jurisdiction, and leave to serve the writ in Scotland was refused under Ord. 11, r. 1 (c) and (e).—*Jones v. Scottish Accident Ins. Co.*, L.R. 17 Q.B.D. 421; 55 L.J. Q.B. 415; 55 L.T. 218.
- (x.) **C. A.**—*Service out of the Jurisdiction—Concurrent Writ—Statute of Limitations.*—A concurrent writ may be issued after the original writ has been issued, and although there is only one defendant, and it may be issued for service abroad though the original writ is for service in England. Under Ord. 64, r. 7, the Court may enlarge the time for its issue, although it may affect the operation of the statute of limitation.—*Smallpage v. Tonge*, 55 L.T. 44; 34 W.R. 768.

- (i.) **C. A.**—*Service out of the Jurisdiction—Order Imposing Terms.*—Where it is doubtful whether a case falls within Ord. 11, leave to serve the writ may be given with a limitation that the plaintiff recover only so much of the claim as should be proved at the trial to fall within Ord. 11.—*Thomas v. Duchess of Hamilton*, L.R. 17 Q.B.D. 592; 55 L.T. 219.
- (ii.) **Ch. D.**—*Service of Writ—Foreign Corporation Agency in London.*—A bank incorporated under a Colonial Statute with an agency in London can be served with an ordinary writ at the agency.—*L'honneur, Linon & Co. v. Hong Kong Bank*, 55 L.J. Ch. 758; 54 L.T. 863; 34 W.R. 758.
- (iii.) **Ch. D.**—*Service of Writ—Partners sued in Firm's Name—Foreign Firm—Person having Control of Business—Ord. 9, r. 6.*—Service of a writ on an agent in England who was employed by a foreign firm to procure and forward certain things necessary to the firm's business, he being paid for his work done, was vacated, as he was held not to be a person carrying on the defendant's business within Ord. 9, r. 6.—*Baillie v. Goodwin*, 55 L.T. 56; 34 W.R. 787.
See Administration, p. 1. *Bankruptcy*, p. 2. *Company*, p. 5. *County Court*, p. 6. *Divorce*, p. 7. *Infant*, p. 8. *Poor Law*, p. 13. *Railway*, p. 15. *Solicitor*, p. 18.

Prescription.—*See Easement*, p. 7, ix.

Principal and Agent :—

- (iv.) **Ch. D.**—*Debtor and Creditor—Interest.*—A principal has a right to revoke instructions given to his agent to pay at a future date, any time before that date; and though the instructions are notified to the creditor, he has no claim against the agent.—*Henderson v. Rothschild*, 55 L.T. 165; 34 W.R. 769.
See Company, p. 7, ix. *Practice*, p. 15, ii. *Ship*, p. 17, vii.

Public Health :—

- (v.) **C. A.**—*Works for Sewage Purposes.*—The cleaning, levelling, and cementing the bottom of a pool into which the effluent from sewage works flows, is a "work for sewage purposes" within Public Health Act, 1875, s. 32.—*Wimbledon Local Board v. Croydon Sanitary Authority*, L.R. 32 Ch. D. 421; 55 L.T. 106.

Railway :—

- (vi.) **Ch. D.**—*Compensation—Minerals—Severance—Right of Way—Access—Railway Clauses Act, 1845, ss. 77, 81.*—Defendant owned mines under a triangle of land acquired by the railway from his predecessor in title, the lines running on the three sides. He also owned the mines under the land to the west; also a right of way up to the line over the land to the east; this land had been sold by his predecessor in title to a third party after the purchase by the railway. Held, he was entitled to work his mines by means of passages under the railway from the lands on the other side which contained mines of which he was the owner, lessee, or occupier, and to compensation for the extra expense; also to work from the surface in accordance with the custom of the country, provided he had obtained access to them in accordance with his rights.—*Midland Ry. v. Miles*, 55 L.J. Ch. 745.
- (vii.) **Ch. D.**—*Petition for Payment out of Deposit—Service on Landowner—Lands Clauses Act, ss. 85, 87.*—The railway paid into Court a deposit in 1867 in respect of the interest of the tenant for life in lands of which they afterwards purchased the fee simple from the trustees of the settlement: the conveyance was executed, the tenant for life being a party.

He died in 1883. *Held*, a petition for payment of the fund out of Court need not be served on the landowner's representative, considering the lapse of time since the conveyance.—*Re Lancashire and Yorkshire Ry.*, 55 L.T. 58.

- (i.) **H. L.**—*Unequal Rates—Agreement to Reduce—Lower Rates.*—An agreement to reduce rates in the event of a lower charge being made with any other trader for the same class of goods includes a case where a lower rate is charged to another trader on account of the greater distance the goods are carried.—*Glasgow and S.-W. Ry. v. Mackinnon*, L.R. 11 App. Ca. 386.

See Vendor and Purchaser, p. 20, iii.

Revenue:—

- (ii.) **Q. B. D.**—*Excise License—Retail Dealer—Traveller.*—A traveller for a fully licensed firm of wine and spirit merchants at B. had an office at C. where he resided and where he took orders. The firm did not rent or store goods on the premises. *Held*, he was a *bond fide* traveller taking orders for his employer and not liable to take out a license.—*Stuchbery v. Spencer*, 55 L.J. M.C. 141.

Scotch Law:—

- (iii.) **H. L.**—*Entailed Estates—Legitim—Exclusion of Apparent Heir—Acquiescence.*—Although the right of children may be barred or excluded altogether, either by direct renunciation between their father and them, or by an express exclusion of their right in the ante-nuptial contract of their parents, yet their right cannot be barred by inference or implication. A son remained in ignorance of his right to legitim for nearly three years after his father's death. All parties acted as if legitim was not due. *Held*, the son's claim to legitim was not barred by acquiescence.—*Kintore v. Kintore*, L.R. 11 App. Ca. 394.

See Charity, p. 4, vi.

Settlement:—

- (iv.) **Ch. D.**—*Purchase-money in Court—Payment out—Execution of Appointment.*—Lands settled to A. for life with remainder to B. in tail who sold under the Settled Estates Act, 1877; the purchase-money was paid into Court and dividends ordered to be paid to A. for life. A. and B. executed a disentailing assurance assigning the money to a trustee upon such trusts as they should appoint, and discharging it of all trusts for reinvestment in land. *Held* the money might be paid out to them without requiring them to execute any appointment.—*Re Winstanley's Settled Estate*, 54 L.T. 840.
- (v.) **Ch. D.**—*Tenant for Life—Notice to Trustees.*—On a sale by tenant for life under Settled Land Act, 1882, a notice to the trustees given less than a month before the contract but more than a month before the day fixed for completion, *held* sufficient compliance with section 45.—*Duke of Marlborough v. Sartoris*, L.R. 32 Ch. D. 616.

See Divorce, p. 7, vi. Husband and Wife, p. 8, vi., vii.

Sewers:—

- (vi.) **H. L.**—*Commissioners—Liability to repair ratione tenuræ—Pre-emption.*—Decision of C. A. (see Vol. 10, p. 117, vi.) affirmed.—*Fobbing Level Commissioners v. R.*, 34 W.R. 721.

See Public Health, p. 15, v.

Ship :—

- (i.) **C. A.**—*Bill of Lading—Perils of the Sea—Negligence—Onus of Proof*—A collision is not necessarily a peril of the sea within the meaning of those words in a bill of lading: the defendants must shew that it was not occasioned by their negligence, the onus being on them to bring themselves within the excepted perils.—*The Xantho*, 55 L.T. 213.
- (ii.) **Q. B. D.**—*Charter-Party—Bill of Lading—Measure of Damages*.—In action by vendor of goods sold "to arrive" against shipowner for loss of goods, the measure of damages is the price at which the goods were sold. A clause in a bill of lading, which was not in the charter-party, protecting owners from liability for any act of the master, held not to control the contract contained in the charter-party.—*Rodoconachi v. Milburn*, L.R. 17 Q.B.D. 316.
- (iii.) **P. D.**—*Collision—Inevitable Accident*.—In an action for collision the plaintiffs in reply admitted that it was not caused by defendant's negligence, but was the result of inevitable accident: Held defendants entitled to judgment and costs.—*The Naples*, 55 L.J. P. 64.
- (iv.) **P. D.**—*Collision—Steamer and Keel—Duty of Keel*.—A steamer in a reach where there is a risk of her smelling the ground must be under control in order to be able to avoid collisions in case she does smell the ground. A keel drifting up river is not bound to keep out of the deep water although she obstructs steamers who can only navigate there, if she drifts with her mast down, lashed or not to another, she must go up dredging with her anchor down.—*The Ralph Creyke*, 55 L.T. 155.
- (v.) **C. A.**—*Collision—Tyne Improvement Commissioners' Bye-Laws, 1884—20*.—Decision of P. D. (see Vol. 11, p. 96, vi.) affirmed.—*The Harvest*, L.R. 11 P.D. 90; 55 L.J. P. 35; 55 L.T. 202.
- (vi.) **P. D.**—*Co-Ownership—Action of Restraint—Bail Bond*.—Where the defendants in an action of restraint have given a bond for the safe return of the ship, they may still dispute the plaintiff's right to bring the action: if it is disproved, the Court will set aside the bond.—*The Keroula*, L.R. 11 P.D. 92; 55 L.J. P. 45; 55 L.T. 61.
- (vii.) **P. D.**—*Co-Ownership Action—Managing Owner—Principal and Agent*.—Where a part owner of a ship pays to the managing owner his contribution due as agreed upon the ship's accounts, the managing owner receives it as agent for all the owners, and if he misapplies them, the contributing owner is entitled to credit for the amount paid; and all must alike make good a due proportion of the defalcations.—*The Ida*, 55 L.T. 59.
- (viii.) **P. D.**—*Limitation of Liability—Collision with two Ships—Separate Acts of Negligence*.—Where a ship collides with two vessels with only a short interval between the two collisions, the shipowner will be entitled to limit his liability to £8 per ton (there being no loss of life) if the first collision is the substantial cause of the second, and there is no separate act of negligence.—*The Creadon*, 54 L.T. 880.
- (ix.) **P. D.**—*Maritime Lien—Disbursements*.—The master of a ship has a lien on the vessel for disbursements, and his claim is to be preferred to that of a purchaser.—*The Ringdove*, 55 L.J. P. 56; 84 W.R. 744.
- (x.) **Q. B. D.**—*Merchant Shipping Act, 1854, s. 147—Supplying Seamen to Ships without License*.—Proof having been given of the supply of a seaman to a merchant ship on a charge under section 147, the onus of proving that the seaman held a license from the Board of Trade rests with the defendant.—*R. v. Johnston*, 55 L.T. 265.

- (i.) **H. L.**—*Necessaries—Foreign Vessel—Maritime Lien—Bottomry Bond—3 & 4 Vict., c. 65, s. 6.*—Decision of C. A. (see Vol. 10, p. 79, xi.) affirmed.—*Northcote v. Owners of Henrich Björn; The Henrich Björn*, L.R. 11 App. Ca. 270; 55 L.T. 66.

Solicitor :—

- (ii.) **Ch. D.**—*Bankruptcy of Client—Purchase by Solicitor from Trustee—Inadequate Price.*—Upon the construction of a will it was doubtful whether a bankrupt was entitled to an absolute or to a life interest. The bankrupt's solicitor bought the interest, advising that it was only for life, at much under its real value, from the trustee in the bankruptcy. *Held*, a fiduciary relation existed between the solicitor and his bankrupt client, and he was bound to disclose the exact state of the case to the trustee: as he did not, he was declared trustee of all the advantage of the purchase for the trustee in bankruptcy: the Court had previously declared that the interest was an absolute one.—*Luddy's Trustee v. Peard*, 55 L.T. 137.
- (iii.) **Q. B. D.**—*Mayor's Court.*—A solicitor is equally liable to be sued in the Mayor's Court as in the Supreme Court. — *Day v. Ward*, 55 L.J. Q.B. 494.
- (iv.) **C. A.**—*Order for Taxation—Subsequent Alterations of Bill.*—A bill of costs was brought in containing an item in a lump sum for the costs, &c., of an action; the agreement to pay this not being in writing was held to be invalid. *Held*, the solicitor was entitled to bring in for taxation a bill containing the particulars, so long as the lump sum was not exceeded.—*Re Russell*, 55 L.T. 71.
- (v.) **Ch. D.**—*Sale of Realty—Auctioneer's and Surveyor's Fees—Solicitors Remuneration Act, 1881, G. O. r. 4, Sched. 1, pt. 1, r. 11.*—A trust estate was ordered to be sold by the Court, costs to be taxed: the appointments of an auctioneer and surveyor were sanctioned. The master allowed a fee to the auctioneer, according to the custom of the country; and also to the surveyors for preparing it for sale. *Held*, the solicitors were not entitled to the scale-charges for conducting the sale, as some of the work which they ought to have done had been done by the surveyor. The summons having been taken out by the trustees instead of the solicitors, they were ordered to pay the costs personally.—*Wood v. Calvert*, 55 L.T. 53; 34 W.B. 732.
- (vi.) **C. A.**—*Taxation—Objection—Charge on Recovered or Preserved Property—Solicitors Act, 1860, s. 28—Ord. 65, r. 16.*—In taxing costs, the master gave notice at 4.30 to opposing solicitor that he would consider their objection at 1 o'clock the following day. *Held*, a sufficient notice.
- Solicitors had been overpaid, the solicitor acting in opposition had obtained a charge on the amount overpaid for his own costs; the first solicitor objected to his retainer. *Held*, the costs of the opposition to the proceedings to set aside the retainer were costs in recovering the over-payment, and were properly included in the taxation; and also the costs of the appeal therein.—*Re Hill*, 55 L.T. 104.
- See Criminal Law, p. 6, vi. Practice, p. 14, i. Vendor and Purchaser, p. 20, i.

Trade-Mark :—

- (vii.) **Ch. D.**—*Fancy Name—Registration.*—The Court will order the registration of a "fancy" name, although it is not a descriptive one.—*Re Leaf's trade-mark*, 55 L.J. Ch. 740; 55 L.T. 254.

- (i.) **Ch. D.**—*Fancy Words*.—The words "Hand Grenade Fancy Extinguisher," held, not registrable as fancy words under the Act of 1883, section 54.—*Re Harden Star Hand Grenade Co.*, 55 L.J. Ch. 596; 54 L.T. 834.
- (ii.) **Ch. D.**—*Fancy Words—Geographical Name*.—A geographical word may be a purely "fancy word," within Patents Act, 1883, section 64, and not descriptive of locality simply: e.g., "Melrose Hair Restorer."—*Re Van Duzer's trade-mark*, 34 W.R. 780; 55 L.T. 134.
- (iii.) **Ch. D.**—*Infringement—Offer to Compensate*.—Although there is an offer by the infringer to compensate the owner of the trade-mark and to destroy the infringements, a motion for an injunction is not unnecessary and the defendants must pay the costs of it.—*Fennessy v. Day* 55 L.T. 161.

Trustee:—

- (iv.) **Ch. D.**—*Accretion to Estate—Devise to First Mortgagees*.—Freehold ground rent arising out of premises, and all the interest in them, devised "to the present mortgagees thereof:" There was no mortgagee, but the leasehold premises, out of which the rent arose, were mortgaged by demise to the trustees of a certain settlement to secure moneys advanced by them out of the trust fund. The trustees and beneficiaries were strangers to the testator. Held, the ground rent passed to the trustees on the trusts of the settlement, and not beneficially.—*Kibble v. Payne*; *re Payne's settlement*, 54 L.T. 840.
- (v.) **Ch. D.**—*Bankrupt and Absconding—Re-Appointment*.—When one of several trustees is bankrupt and has absconded, the Court will not, where there is a continuing trust, re-appoint the other trustees in place of themselves and the bankrupt, although another cannot be found.—*Re Gardiner's trusts*, 55 L.J. Ch. 714; 55 L.T. 261.
- (vi.) **Ch. D.**—*Improvident Investment—Mortgage on House Property*.—Trustees empowered to invest on mortgage advanced a large sum on the security of some small leasehold cottages let to weekly tenants; the sum advanced was equal to two-thirds of the value of the property, and they had not obtained any formal valuation. Held, they were personally liable.—*Olive v. Westerman*; *re Olive*, 55 L.T. 83.
- (vii.) **Ch. D.**—*Investment—Direction to Invest in Irish Land—Conversion Postponed*.—Testator directed that his personalty should be converted and invested in Irish lands: Held, it would be unwise to do so now, and trustees must postpone the conversion.—*Maberly v. Maberly*; *re Maberly*, 55 L.T. 164; 34 W.R. 771.
- (viii.) **Ch. D.**—*Production of Title-Deeds*.—A child, entitled in remainder to a share of the testator's real estate, desired to raise money on it: Held he was entitled to a production of the title-deeds in the custody of the trustees for the purpose of shewing his title.—*Cowin v. Gravell*; *re Cowin*, 34 W.R. 785.
- (ix.) **C. A.**—*Right to Follow Trust Funds—Plea of Purchaser without Notice*.—Decision of Ch. D. (see Vol. 11, p. 64, iii.) affirmed.—*Taylor v. Blake-lock*, L.R. 32 Ch. D. 660; 55 L.T. 8.

See Practice, p. 14, v. Vendor and Purchaser, p. 20, ii. Will, p. 21, vii.

Vaccination:—

- (x.) **Q. B. D.**—*Default of Appearance of Parent*.—An order for vaccination of a child may be made under the Act of 1867, s. 31, in the parent's absence if he has been duly summoned.—*R. v. Crawford*, 34 W.R. 789.

Vendor and Purchaser:—

- (i.) **H. L.**—*Sale—Leave to Bid—Fiduciary Relation—Solicitor and Client.*—Decision of C. A. (see Vol. 10, p. 56, i.) reversed.—*Coaks v. Boswell*, L.R. 11 App. Ca. 282; 55 L.T. 32.
- (ii.) **Ch. D.**—*Trustees—Covenant not to take in Specie—Power to Sell by Cestuis-que-Trustent.*—A covenant with the trustees was entered into by the beneficiaries under a settlement that neither of them would claim to have the rent charge and life estate, the subject of the settlement, made over to them in specie. The tenant for life died and the beneficiaries contracted to sell some of the land in fee: *Held*, as there was no one to enforce the covenant against them, and as they could at any sale outbid any other person and then become tenants for life, they must be so treated, and that they therefore had power to sell.—*Re Hale and Smyth's contract*, 55 L.T. 151.
- (iii.) **Ch. D.**—*Vendor's Lien—Sale to Railway—Order for Possession.*—An unpaid vendor of land taken by a railway is entitled to the usual relief of unpaid vendors: he can obtain an injunction restraining the company from using the land, and an order for delivery up of possession.—*Allgood v. Merrybent & Darlington Ry.*, 55 L.J. Ch. 743.

Water:—

- (iv.) **Q. B. D.**—*Company—Duty to fix Fire-Plugs in Mains.*—The Waterworks Clauses Act, 1847, s. 38, imposes no duty on the company to provide a pipe of sufficient capacity to carry a proper fire-plug in a place where their existing pipe is insufficient for that purpose, although in the opinion of the justices it is essential that a fire-plug should be placed there.—*R. v. Wells Water Company*, 55 L.T. 188.
- (v.) **H. L.**—*Company—Duty to Supply Pure Water—Service Pipe.*—Decision of C. A. (see Vol. 9, p. 52, vii.) affirmed.—*Milnes v. Mayor of Huddersfield*, 34 W.R. 761.
- (vi.) **C. A.**—*Company—Right to Place Stop Valves in Footway—Waterworks Clauses Act, 1847—Metropolis Management Act, 1855.*—Judgment of Q. B. D. (see Vol. 11, p. 100, iii.) affirmed.—*East London Waterworks v. St. Matthew's, Bethnal Green, Vestry*, L.R. 17 Q.B.D. 475; 54 L.T. 919. See Easement, p. 7, ix.

Will:—

- (vii.) **C. A.**—*Absolute Gift—Indefinite Gift of Income.*—"With regard to the residue of my estate my executors shall pay the interest in equal parts half-yearly to my sons, F., E., and A., the share of a predeceessor to be equally divided to the survivors or survivor." *Held*, the sole survivor A. was entitled to the capital of the residue.—*Tandy v. Tandy; re Tandy*, 34 W.R. 748.
- (viii.) **P. C.**—*Construction—Cape of Good Hope.*—Devise to sons to "remain in the first place for both of them, and secondly the eldest son among our grandchildren shall always have the same right thereto, and after the decease of their parents shall remain in possession thereof, with this understanding, that the other heirs who may still be born shall enjoy equal rights thereto." *Held*, the words "other heirs" referred to the other children of the testators.—*De Jager v. De Jager*, 55 L.J. P.C. 22; 54 L.T. 806.
- (ix.) **Ch. D.**—*Construction—Gift to a Peer—Lapse.*—A gift to a peer must be construed to mean the person who held the title at the date of the will; if he is dead the gift lapses.—*Ogle v. Lord Sherborne; re Whorwood*, 55 L.T. 89.

- (i.) **Ch. D.—Construction—Omissions Supplied.**—Words in brackets “[and subject as aforesaid, &c.]” in the declaration of a first set of trusts, held necessary to be supplied as accidentally omitted in the declaration of a second set.—*Mellor v. Daintree*, 55 L.T. 175.
- (ii.) **Ch. D.—Contingent Legacy—Right to Intermediate Income—Infant—Maintenance.**—Trust to pay and divide a sum of money among certain people contingently on their surviving him and attaining twenty-one: in default of any person attaining a vested interest the share to fall into the residue. Held, there was a gift of the intermediate income, which was therefore applicable to maintenance, where the legatee was an infant.—*Ruffle v. Medlock*; *re Medlock*, 55 L.J. Ch. 788; 54 L.T. 828.
- (iii.) **Ch. D.—Contingent Remainder—Accumulation—Attraction.**—Testator gave to his wife a life interest in his residuary real estate, then in trust for his grandson for life, then to his grandson's children who should attain twenty-one: if there were no children on other trusts. There was also a gift of the residuary personalty on trusts, some of which were the same as for the realty. The trustees had power to grant leases, and apply rents and profits of the realty in making repairs. The testator, widow, and grandson having died: Held, the gift to the grandson's child, an infant, was a contingent and not a vested remainder, and subject to being divested: and that the accumulated rents accruing between the death of the grandson and the time the infant came of age belonged to the testator's heir-at-law.—*Spencer v. Brighouse*; *re Williams*, 54 L.T. 831.
- (iv.) **Ch. D.—Erroneous Statement of Fact—Hotchpot—Right of Legatee to Contradict Will.**—Where in a will the testator states that certain sums have been advanced to his sons, and that they are to be brought into hotchpot, the legatees are bound by the will and cannot shew that the advances were of less amount.—*Ward v. Wood*; *re Wood*, L.R. 32 Ch. D. 517; 55 L.J. Ch. 720; 34 W.R. 788; *Wood v. Ward*, 54 L.T. 982.
- (v.) **Ch. D.—Gift to Legatees or their Legal Personal Representatives—Next-of-kin.**—The *prima facie* meaning of “legal personal representatives” is executors or administrators; but where the testator had used those words in a similar gift, a change of meaning was inferred, and the legacies to persons or “their legal personal representatives” held to belong to those next-of-kin who would have been next-of-kin according to statute of distribution if the legatee had died at the same time as the testatrix.—*Machell v. Newman*; *re Thompson*, 55 L.T. 85.
- (vi.) **Ch. D.—Name and Arms Clause—Forfeiture—College of Arms—Declaratory Judgment—Ord. 25, r. 5.**—The Court may make a declaratory order though no consequential relief is claimed. The power will be exercised with great caution. A name and arms clause is only satisfied by a proper grant from the College of Arms. Where the identical arms are refused by the College, the devisee is not necessarily divested of the estate, if he has used his best endeavours to obtain it.—*Austin v. Collins*, 54 L.T. 903.
- (vii.) **Ch. D.—New Trustees—Vesting Order—Escheat.**—Where the Crown has become entitled to the whole of the trust estate of a testator and also to part of the beneficial interest therein, the Court cannot on an application under the Trustee Acts for the appointment of new trustees of the will and vesting order, make a vesting order against the Crown; an application must be made under Intestates Estates Act, 1884, s. 5.—*Re Pratt's Trusts*, 34 W.R. 757.

- (i.) **Ch. D.**—*Power of Advancement—Exercise of.*—Where a power of advancement is given by will, it is a power to be exercised in the early life of the object and with reference to some specific step to be taken by such object. It is not to be exercised at the caprice of the donee or from any simple desire on the part of the object to have the money.—*Abram v. Aldridge*; *re Aldridge*, 54 L.T. 827.
- (ii.) **Ch. D.**—*Trusts for Accumulation—Power of Maintenance.*—A testator gave annuities to daughters and granddaughter, trustees to accumulate surplus income until the death of all the daughters, the distribution being fixed for that time. There was a power of maintenance which was unlimited in duration, expressed to be exercisable in the daughter's life. There was another trust for accumulation of surplus income not applied in maintenance. *Held*, the grandchildren entitled to have their maintenance and education out of the income.—*Archer v. Prall*; *re Smeed*, 54 L.T. 929.
- (iii.) **P. D.**—*Witness—Subscription.*—A will was signed by deceased in the presence of two persons, one of whom subscribed it with the name of her husband. *Held*, not properly attested.—*In the goods of Leverington*, L.R. 11 P.D. 80; 55 L.J. P. 62.
- See Administration*, p. 1, i.
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Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times
Reports, and Weekly Reporter,

FOR NOVEMBER AND DECEMBER, 1886, AND JANUARY, 1887.

By C. H. LOMAX, M.A., of the Inner Temple,
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Administration :—

- (i.) **Ch. D.**—*Agreement to Compromise Action—Adoption by Administrator—Relation Back of Grant of Administration.*—A plaintiff having agreed to compromise an action and having died intestate before the consideration for the compromise was fixed, and such consideration having been fixed by agreement with his administrator before the grant of administration, the administration when granted relates back to the death of the intestate, and the administrator may enforce the agreement for compromise.—*Baker v. Blaker*, 55 L.T. 723.
- (ii.) **Ch. D.**—*Conversion—Parol Contract for Sale by Testator—Sale by Devisee.*—Where a testator has made a parol contract for sale of land, a sale by the devisee does not cause a conversion if made under a new contract, though made to the same purchaser and at the same price, and though credit is given for the deposit paid to the testator.—*Re Harrison ; Parry v. Harrison*, 35 W.R. 196.
- (iii.) **Ch. D.**—*Estate of Deceased Partner—Joint and Separate Creditors—Interest on Debts—Priority*—1 & 2 Vict., c. 110, s. 17—*R. S. C.*, 1883, Ord. 55, rr. 62, 63.—The separate creditors of a deceased partner whose debts do not, by law or special contract, carry interest, are entitled to interest in priority to joint creditors after the principal of both joint and separate debts has been paid in full. The dividends paid must be considered as having been paid first on account of interest, and the balance in reduction of principal.—*Whittingstall v. Grover*, 35 W.R. 4.
- (iv.) **Ch. D.**—*Executor—Payment under Mistake—Acquiescence.*—Executors who have distributed the assets in accordance with an erroneous interpretation of the will are generally liable to refund with interest, but are not liable for interest to a legatee to whom, with full knowledge on his part and under a common mistake, payments which he must refund have been made.—*Re Hulkes ; Powell v. Hulkes*, L.R. 33 Ch.D. 552 ; 55 L.J. Ch. 846 ; 35 W.R. 194.

- (i.) **Ch. D.**—*Married Woman—Funeral Expenses—Surety—Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), s. 5.*—A husband, executor of his wife's will, made under a power of appointment, may retain out of her estate funeral expenses, though the estate is insufficient for creditors, and though the will contained no charge of debts and funeral expenses. A co-surety who has satisfied a judgment obtained against the debtor and his sureties, is entitled to stand in the place of the judgment creditor, though he has not obtained an actual assignment of the judgment.—*Re M'Myn; Lightbown v. M'Myn*, L.R. 33 Ch. D. 575; 55 L.J. Ch. 845; 35 W.R. 179.
- (ii.) **Ch. D.**—*Payment to one Executor—Agent.*—A debtor to the estate of a deceased person, who places money in the hands of his agent to pay his debt, the agent being one of the executors, is not discharged if the agent misapplies the money.—*Miller v. Douglas*, 55 L.T. 583; 35 W.R. 122.

Arbitration :—

- (iii.) **C. A.**—*Valuers—Umpire.*—An umpire appointed by two valuers in accordance with the provisions of an agreement for a valuation, is not an arbitrator, and his valuation is not an award over which the Court has jurisdiction.—*Re Wilson and Green*, L.R. 18 Q.B.D. 7; 35 W.R. 43.

Attachment.—See *Executor*, p. 32, i.

Bankruptcy :—

- (iv.) **Q. B. D.**—*Assets—Voluntary Allowance—Retired Officer—Bankruptcy Act, 1883, s. 53.*—A voluntary allowance granted by the Secretary of State for India to an officer of the Indian army on compulsory retirement, is not income within section 53 of the Bankruptcy Act, and therefore an order for payment of such allowance to the trustee in bankruptcy of the officer cannot be made.—*Re Webber; e. p. Webber*, L.R. 18 Q.B.D. 111.
- (v.) **C. A.**—*Discharge—Registrar's Discretion—Appeal—Person Aggrieved—Costs—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 28, sub-s. 3; s. 104, sub-s. 2.*—The Court of Appeal may overrule the Registrar's discretion as to granting a discharge, where such discretion was exercised under a mistaken view of facts, which if proved come under the facts mentioned in sub-section 3, section 28 of the Bankruptcy Act, 1883. Opposing creditors are "persons aggrieved" and may appeal. Costs may be given against an undischarged bankrupt.—*E. p. Castle Mail Co.; re Payne*, L.R. 18 Q.B.D. 164; 35 W.R. 89.
- (vi.) **C. A.**—*Fraudulent Preference—Intention of Debtor.*—A repayment by a debtor on the eve of bankruptcy, either voluntarily or under pressure, of trust funds which he has misappropriated is not a fraudulent preference.—*E. p. Taylor; re Goldsmid*, 35 W.R. 148.
- (vii.) **C. A.**—*Foreign Bill of Exchange—Damages for Re-exchange—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61) ss. 57, 97.*—The drawer in a foreign country of a bill of exchange accepted and dishonoured in England, may prove, in the bankruptcy of the acceptor, not only for the amount of the bill with interest and expenses, but also in respect of his liability to pay damages for re-exchange.—*E. p. Roberts; in re Gillespie*, 35 W.R. 128.
- (viii.) **C. A.**—*Fraudulent Conveyance—Voluntary Settlement—Pending Action—Intent to Defraud Creditors.*—A voluntary settlement on his wife and children of the whole property of a man who has at the time no debts, but against whom an action for damages is pending, is not void, there being no proof that the object was to defraud the plaintiff in the action of his damages if recovered.—*E. p. Mercer; in re Wise*, L.R. 17 Q.B.D. 290.

- (i.) **H. L.**—*Partnership—Stockbroker—Incomplete Transfer—Reputed Ownership.*—Judgment of C. A. (see Vol. 11, p. 108, v.) reversed.—*Colonial Bank v. Whinney*, 55 L.T. 362.
- (ii.) **C. A.**—*Receiving Order—Rescission—Stay of Proceedings—Discretion of Registrar.*—The registrar must exercise his discretion as to the sufficiency of the consent of creditors to the rescission of a receiving order or the stay of proceedings. Pending such rescission or stay of proceedings the debtor ought not, even with the consent of all the petitioning creditors, to be left in unfettered control of his property.—*E. p. Carr*; in *re Carr*, 35 W.R. 150.
- (iii.) **C. A.**—*Reproof of Debt for Purpose of Voting.—Bankruptcy Act, 1869 (32 & 33 Vict., c. 71), s. 16, sub-s. 2—Bankruptcy Rules, 1870, rr. 67, 145—Bankruptcy Rules, 1883, r. 113—Security for Costs.*—When the Court considers that a debt has been sufficiently established it may dispense with reproof for the purpose of voting. On entering an appeal, a bankrupt who has carried on a long and always unsuccessful litigation with the respondents on the matters in question may be ordered to increase the amount of his deposit.—*E. p. New York, Lake Erie, & Great Western Ry. Co.*; *re McHenry*, 35 W.R. 20.
- (iv.) **C. A.**—*Valuation of Security.*—Decision of Q. B. D. (see Vol. 11, p. 109, i.) reversed.—*E. p. Norris*; *re Sadler*, L.R. 17 Q.B.D. 728; 35 W.R. 19.
- (v.) **Q. B. D.**—*Vivâ Voce Evidence.*—When the parties have agreed that the evidence on a motion shall be taken *vivâ voce* leave need not be obtained, but notice must be given to the clerk of the Court who will enter the motion on a special list, and an application must be made to the Court to fix a day. Where there is no such agreement a motion must be made for leave to take evidence *vivâ voce*.—*Re Underhill*, L.R. 18 Q.B.D. 115.
- (vi.) **P. D.**—*Wife's Estate—Right to Administer—Bankruptcy Act, 1869, s. 44—Court of Probate Act (20 & 21 Vict., c. 77), s. 73.*—A husband's right to administer to his wife's estate does not vest in his trustee in bankruptcy. A husband having become bankrupt and gone abroad, grant of letters of administration to the estate of his wife was made to his trustee, though his right to administer cannot be regarded as property divisible among his creditors under the Bankruptcy Act.—*In the goods of Jane Turner*, L.R. 12 P.D. 18.
- (vii.) **Q. B. D.**—*Assignee of Lease—Proof by Lessor—Appeal from County Court—Costs.*—The lessor being also mortgagor of the subject matter of a lease, is entitled to prove against the estate of the assignees. The trustee having appealed against the decision of the County Court Judge without obtaining a guarantee against costs, ordered to pay them personally.—*Re Malden, Gibson & Co.*; *e. p. James*, 65 L.T. 708.
See Landlord and Tenant, p. 33, vii.

Bill of Exchange :—

- (viii.) **Ch. D.**—*Stamp—Particular Fund—Statute of Limitations—Claim against Estate of Deceased Person—Lapse of Time.*—A foreign bill of exchange is sufficiently stamped with a penny adhesive stamp. An order payable on demand for £7,000 "on account of the dividends and interest registered in the books of the Bank of England" is a good bill of exchange. The Statute of Limitations does not begin to run against the holder of a bill of exchange until presentment and dishonour. A long lapse of time before the first endorsement, and again before the

second endorsement, held to affect the holder claiming against the estate of the drawer after his death, with notice of equities between the drawer and the first endorsee.—*Re Boyse; Crofton v. Crofton*, L.R. 33 Ch. D. 612; 55 L.T. 391.

See Bankruptcy, p. 24, vii.

Bill of Sale:—

- (i.) **C. A.**—*Assignment of After-acquired Property—Future Book Debts.*—Decision of Q. B. D. (see Vol. 11, p. 109, iii.) reversed.—*Official Receiver v. Tailby*, L.R. 18 Q.B.D. 25; 56 L.J. Q.B. 30; 55 L.T. 626; 35 W.R. 91.
- (ii.) **C. A.**—*Statement of Consideration—Form in Schedule—Practice—Judgment on Interpleader Issue.*—*Notice of Appeal*—R.S.C., 1883, O. lviii., r. 3.—Judgment of Q. B. D. (see Vol. 11, p. 109, viii.) reversed. The judgment of the Divisional Court on an interpleader issue is a final order, and the notice of appeal must be a fourteen days' notice.—*Hughes v. Little*, L.R. 18 Q.B.D. 32; 55 L.J. Q.B. 503; 55 L.T. 476; 35 W.R. 36.
- (iii.) **C. A.**—*Interest upon Interest, upon Premiums of Insurance and upon Rent, &c.*—*Bills of Sale Act, 1882*, s. 9.—Decision of Q. B. D. (see Vol. 11, p. 74, iv.) reversed.—*Goldstrom v. Tallerman*, L.R. 18 Q.B.D. 1; 56 L.J. Q.B. 22; 35 W.R. 68.
- (iv.) **C. A.**—*Power of Sale—Purchaser not bound to inquire as to default.*—*Bills of Sale Act (1878) Amendment Act, 1882* (45 & 46 Vict., c. 43) s. 9.—“Maintenance or defeasance of the security.”—A provision in a bill of sale that the purchaser shall not be bound to enquire whether there has been any default to give rise to the power of sale, is not a stipulation for the “maintenance or defeasance of the security,” and makes the bill of sale void.—*Blaiberg v. Beckett*, L.R. 18 Q.B.D. 96; 56 L.J. Q.B. 35; 35 W.R. 34.

See Mortgage, p. 35, ix

Charity:—

- (v.) **Ch. D.**—*Bequest—Repair of Churchyard—Church Building Act* (43 Geo. III., c. 108), s. 1—*Partial Invalidity of Trust.*—A bequest of a sum not exceeding £500 on trust to apply the income in repairing a churchyard is a good charitable bequest. Where part of the income is to be applied under an invalid trust and the “residue” in repairing a churchyard the trust is good as to the residue, and the amount which would have been required for the invalid trust must be ascertained.—*In re Vaughan; Vaughan v. Thomas*, L.R. 33 Ch. D. 187; 55 L.T. 547; 35 W.R. 104.
- (vi.) **Ch. D.**—*Cy-près.*—A legacy on trust for the establishment of a soup kitchen and cottage hospital for the parish of S. in such a manner as not to violate the Mortmain Acts, shews a general intention to benefit the poor of the parish, and will be applied *cy-près*, the particular trusts being incapable of execution.—*Biscoe v. Jackson*, 55 L.T. 607; 35 W.R. 152.

Building Society:—

- (vii.) **H. L.**—*Winding-up—Borrowing Members.*—Where the rules of a building society provided for the redemption by borrowing members of their securities, held that, in a winding-up, there being no outside creditors, the borrowing members were entitled to redeem according to the rules, and were not bound to remain members and bear their share of losses.—*Tosh v. North British Building Society*, L.R. 11 App. Cas. 489.

Colonial Law:—

- (i.) **P. C.—Appeal—Practice.**—Where an appellant, objecting to a verdict has neglected to move the Court below for a new trial, in accordance with the rules and practice of the Court, Her Majesty in Council cannot alter or set aside the verdict, and cannot be advised to order a new trial.—*Dagnino v. Bellotti*, L.R. 11 App. Cas. 604; 55 L.T. 497.
- (ii.) **P. C.—Canada.**—*Limitation—Mortgage—Payment—Consolidated Statutes of New Brunswick*, c. 84, s. 30.—Payments made to a mortgagee by a person who, under the terms of the contract, was entitled to make a tender, and from whom the mortgagee was bound to accept a tender of money for defeasance or redemption of the mortgage, will prevent time running against the mortgagee.—*Lewin v. Wilson*, L.R. 11 App. Cas. 639; 55 L.J. P.C. 75; 55 L.T. 410.
- (iii.) **P. C.—Natal.**—*Testamentary Power—Ordinance, No. 1, of 1856.*—The words "over property subject to those laws and customs," must be implied after the words "laws and customs of England," in Ordinance, No. 1, of 1856, s. 1.—*Salmon v. Duncombe*, L.R. 11 App. Cas. 627; 55 L.J. P.C. 69; 55 L.T. 446.
- (iv.) **P. C.—New South Wales.**—*Real Estate of Intestates Distribution Act, 1862.*—The New South Wales Real Estate of Intestates Distribution Act, 1862, enacting that the real estate of intestates should be administered and devolve as chattels real did before, applies to all cases and not only to those in which the intestate leaves an heir.—*Wentworth v. Humphrey*, L.R. 11 App. Cas. 619; 55 L.J. P.C. 66; 55 L.T. 532.
- (v.) **P. C.—New South Wales.**—*Principal and Surety—Alteration of Security—Mortgage of Sheep.*—Where the principal debtor had given to the creditor as collateral security a mortgage of a flock of sheep, containing provisions for the management of the flock by the mortgagor, a sale of part of the flock in due course of management with the knowledge of the creditor, is not an alteration of the security so as to discharge the surety.—*Taylor v. Bank of New South Wales*, L.R. 11 App. Cas. 596; 55 L.J. P.C. 47; 55 L.T. 444.

Company:—

- (v.) **Ch. D.—Debenture Holders—Arrangement between Secured Creditors—Notices of Meetings—Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict., c. 104).**—Where a trust deed to secure debentures to bearer provides that it may be modified in accordance with resolutions passed at meetings of the debenture holders summoned by advertisement, the majority of the debenture holders at a meeting so summoned may bind the minority by resolutions postponing their security. It is not necessary that the notices sent to debenture holders summoning a meeting to approve a scheme of arrangement, should state that there was a question of priority between the secured creditors, if the notices refer to a scheme which, on the face of it, affects such priority.—*Re The Dominion of Canada Freehold Estate and Timber Company, Limited*, 55 L.T. 347.
- (vi.) **C. A.—Directors—Agency—Issue of Debentures—Warranty—Measure of Damages.**—The directors of a company issuing debentures are to be deemed to assert that they have authority to bind the company, and are answerable for breach of warranty if it turns out that the debentures are an over issue, though the directors were ignorant of the over issue. The genuine debentures of the company having been and being of their full nominal value, the measure of damages is the nominal value of the over issued debentures.—*Firbank v. Humphreys*, L.R. 18 Q.B.D. 54; 35 W.R. 92.

- (i.) **Ch. D.**—*Director's Qualification—Contract to take Shares.*—The mere acting as a director is not sufficient evidence of a contract to take the qualification shares.—*Re Medical Attendance Association, Limited; Onslow's case*, 55 L.T. 612.
- (ii.) **Ch. D.**—*Misrepresentations in Prospectus—Delay.*—A contributory desiring to be relieved of his shares in a company on the ground of two misrepresentations in the prospectus, entirely distinct from each other, is not precluded from relying on one of them by his delay which has caused him to fail in his case as to the other.—*Re London and Provincial Electric Lighting and Power Generating Co.; e. p. Hall*, 55 L.T. 670.
- (iii.) **Ch. D.**—*Promoter—Secret Profits—Rescission Impossible.*—Where rescission of a contract by which property has been sold to a company is not possible, an action will not lie against the vendors who were promoters of the company for profits secretly made by them on the sale.—*Ladywell Mining Co. v. Brookes*, 56 L.J. Ch. 25.
- (iv.) **Ch. D.**—*Realised Profits—Directors—Repayment of Excess Dividends—Remuneration.*—"Realised profits" means profits rendered tangible for purpose of division, as distinguished from profits made apparent by estimating the value of assets. Where the articles of association of a company forbid the payment of dividends, except out of realised profits, and provide that the directors shall receive no remuneration till a seven per cent. dividend has been paid, the directors must repay to creditors of the company all dividends which have been paid otherwise than out of "realised profits," and all the remuneration received by them when the dividends properly payable did not amount to seven per cent.—*Re Oxford Building and Investment Society*, 55 L.T. 598; 35 W.R. 116.
- (v.) **Ch. D.**—*Reduction of Capital—Advertisements—Words "and reduced"*—*Companies Acts, 1867 & 1877.*—Where a company petitioned for the reduction of capital by cancelling lost capital, notice having been sent to each shareholder, and the only creditor being the solicitor to the company, the Court refused to dispense with the usual advertisements, or with the addition to the name of the company of the words "and reduced."—*Re Municipal Trusts Co.*, 55 L.T. 632; 35 W.R. 120.
- (vi.) **C. A.**—*Reduction of Capital—Preference Shares.*—The capital of a company having been increased by the issue of new shares with a preferential dividend, there is nothing in the bargain between the company and the preference shareholders to prevent the company from reducing its capital, after the loss of part of its assets, although the effect of the reduction is to deprive the preference shareholders of a part of their dividends.—*Bannatyne v. Direct Spanish Telegraph Co.*, 55 L.T. 716; 35 W.R. 125.
- (vii.) **Ch. D.**—*Reduction of Capital—Power of Court to Confirm Scheme—Companies Act, 1867, s. 11.*—The power of the Court to confirm a scheme for reduction of capital is a discretionary power, and one matter for consideration is whether the scheme will do injustice between different classes of shareholders. The Court will not alter a scheme, but if necessary will reject it, and leave the company to propose another.—*Re Direct Spanish Telegraph Co.*, 35 W.R. 209.
- (viii.) **Ch. D.**—*Reduction of Capital—Unpaid Calls.*—An order for reduction of capital was made without prejudice to any claim which might be made on certain shareholders who were in default in payment of calls, on evidence that they were persons of no means.—*Great Western Steamship Co., re*, 56 L.J. Ch. 3; 35 W.R. 154.

- (i.) **Ch. D.—Winding-up—Absconding Liquidator—Appointment of New Liquidator—Vesting Order—Trustee Act, 1850—Practice.**—A new liquidator having been appointed in consequence of the official liquidator having absconded, an order was made on motion vesting in the new liquidator a sum of consols standing in the name of the original liquidator. Except in a simple case, a petition should be presented.—*Re The Capital Fire Association, Limited*, 55 L.T. 633.
- (ii.) **C. A.—Winding-up—Debentures—Issue—Estoppel.**—The delivery to his own creditor by a director, who had made advances to a company, of debentures of the company which had been prepared for issue to the public, is not an issue of the debentures so as to entitle the holders to rank *pari passu* with holders of validly issued debentures. *Quære* whether the company would not have been estopped from disputing the validity of the issue.—*Mowatt v. Castle Steel & Iron Works Co.*, L.R. 34 Ch. D. 58; 55 L.T. 645.
- (iii.) **H. L.—Winding-up—Fraudulent Preference—Companies Act, 1862, s. 164.**—Decision of Ch. D. (see Vol. 11, p. 77, iii.) affirmed.—*Willmott v. London Celluloid Co.*, 35 W.R. 145.
- (iv.) **C. A.—Winding-up—Reputed Ownership—Equitable Assignment of Debt—Notice—Companies Act, 1862, s. 153.**—The rules of bankruptcy as to reputed ownership are not imported into the winding-up of companies. No notice of the equitable assignment of a debt is required to perfect the assignment between assignor and assignee, and therefore, when a company makes such an assignment and notice to the debtor is not given till after winding-up, section 153 of the Companies Act does not apply.—*Gorringe v. Irwell India-rubber Works*, 56 L.J. Ch. 85; 55 L.T. 572; 35 W.R. 86.
- (v.) **C. A.—Winding-up—Remuneration of Liquidator—Regulations of 1868.**—The regulations adopted by the Master of the Rolls and Vice-Chancellors in 1868 are not general orders and have not the force of an Act of Parliament, but must guide the judge in exercising his discretion as to the remuneration of a liquidator. Where, in the winding-up of a company, a new company is formed which takes over the assets and liabilities of the old company in consideration of shares allotted to the shareholders in the old company, the value of such shares ought to be considered as the price for which the property of the old company was sold, and the liquidator's remuneration ought to be fixed in accordance with class 6 of the regulations.—*Re Mysore Reefs Gold Mining Co.*, L.R. 34 Ch. D. 14; 55 L.T. 655.
- (vi.) **Ch. D.—Winding-up Petition—Service of.**—A petition for winding-up a company which had no registered place of business and only eight shareholders, ordered to be served on the secretary and two principal shareholders, the other shareholders being informed of the petition by letter.—*Re Keswick Old Brewery Co.*, 55 L.T. 486.
- (vii.) **Ch. D.—Winding-up—Suspension of Business—Majority of Shareholders—Companies Act, 1862, ss. 40, 79.**—Though there may be suspension of business for a year the Court will not make a winding-up order under sub-section 2 of section 79 of the Companies Act, 1862, unless the company intended to abandon, or was unable to carry on, its business; on the question of intention the Court will have regard to the opinion of the majority of the registered shareholders.—*Re The Tomlin Patent Horse Shoe Company, Limited*, 55 L.T. 314.
See Covenant, p. 30, ii.

Copyhold.—*See Settled Land*, p. 45, ii.

Copyright :—

- (i.) **C. A.**—*Copyright Act, 1842 (5 & 6 Vict., c. 45) ss. 2, 3, 13, 24*—*Time of First Publication*.—The statement of the date of publication of a subsequent edition of a book, being a mere reprint of a prior edition which was not registered, is not a true statement of the time of first publication of the book within the meaning of the Copyright Act, 1842, s. 13.—*Thomas v. Turner*, L.R. 38 Ch. D. 292; 56 L.J. Ch. 56; 55 L.T. 534; 35 W.R. 177.

Conversion.—See Administration, p. 23, ii.

Covenant :—

- (ii.) **Ch. D.**—*Not to Trade—Breach of Acting as Servant—Company—Certificate of Incorporation*.—A covenant not to “engage in or be in any way concerned or interested in a business” is broken by being employed as a servant in such a business. A company, the incorporation of which is certified, is a valid company until the certificate is held void.—*Hill and Co. v. Hill*, 35 W.R. 137.

Costs :—

- (iii.) **Q. B. D.**—*County Court—Higher Scale—County Courts Act, 1882 (45 and 46 Vict., c. 57), s. 5*.—A certificate by the Judge of a County Court that a case involved “a question of character” does not bring the case within those in which costs on the higher scale may be given.—*Reg. v. Judge of City of London Court*, L.R. 18 Q.B.D. 105; 55 L.T. 735; 35 W.R. 123.
See Bankruptcy, p. 24, v.; p. 25, iii. Lands Clauses Act, p. 34, iii. and iv. Practice, p. 39, i., vii., viii., ix., x.; p. 40, i.; p. 41, vi.; p. 42, ii. Private Bill Costs, p. 42, vi. Probate, p. 43, ii.

Criminal Law :—

- (iv.) **C. C. R.**—*Undischarged Bankrupt Obtaining Credit—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 31*.—In order to convict an undischarged bankrupt of the statutory offence of obtaining credit without disclosing his bankruptcy, it is not necessary to prove a request for credit.—*Reg. v. Juby*, 35 W.R. 168.

Crown Prerogative :—

- (v.) **Q. B. D. & C. A.**—*Merchant Shipping Act, 1876 (39 & 40 Vict., c. 80), s. 10—Action against Board of Trade—Crown Suits Act, 1865 (28 & 29 Vict., c. 104), s. 46—Change of Venue*.—In an action against the Board of Trade for wrongful detention of a ship the Attorney-General is entitled to demand as of right a trial at bar, and the Court is bound on his waiving such right to change the venue to any county where he elects to have the action tried.—*Dixon v. Farrer, Secretary of the Board of Trade*, L.R. 17 Q.B.D. 658; 18 Q.B.D. 43; 55 L.J. Q.B. 497; 56 L.J. Q.B. 53; 55 L.T. 438 & 578; 35 W.R. 95.

Damages :—

- (vi.) **C. A.**—*Wrongful Detention of Stock—Depreciation*.—Where a bank to whom stock has been pledged by a stockbroker in fraud of his client, has on a motion for injunction undertaken not to deal with the stock, the owner of the stock on his right thereto being admitted, is entitled to damages against the bank for the depreciation in the stock since the undertaking.—*Williams v. Peel River Land and Mineral Company*, 55 L.T. 689.

See Company, p. 27, vii. Easement, p. 31, ii. Landlord and Tenant, p. 33, vii. Ship, p. 46, iii.

Debtor and Creditor :—

- (i.) **C. A.**—*Committal—Order for Payment by Instalments—Debtors Act, 1869 (32 & 33 Vict., c. 62), s. 5.*—There is no jurisdiction on a judgment summons to order payment by instalments, and at the same time to make an order for committal on default of payment of any instalment. An order by a County Court Judge for committal of a judgment debtor, the registrar being directed that the warrant should not issue if the debtor paid certain instalments, is bad.—*Reeves v. Fowle*, 56 L.J. Q.B. 49; 55 L.T. 663; 35 W.R. 130.

See Executor, p. 32, i.

Dower.—*See Vendor and Purchaser*, p. 49, viii.

Easement :—

- (ii.) **C. A.**—*Prescription Act (2 & 3 Will. IV., c. 71).*—The right to access of light to a building cannot be acquired by length of enjoyment, unless light has for the statutory period come into the building by defined openings. A right to the access of air, not by any definite channel, but over the general surface of the alleged servient tenement, cannot be acquired by enjoyment under the Prescription Act.—*Harris v. de Pinna*, L.R. 33 Ch. D. 238.

Ecclesiastical Law :—

- (iii.) **Ch. Court of York.**—*Church Discipline Act (3 & 4 Vict., c. 86), s. 13—Place of Hearing—Offence committed out of Northern Province.*—The Judge of the Chancery Court of York has power to make a rule that the hearing of cases in that Court shall take place without the local limits of the Court. The Chancery Court of York has jurisdiction to hear a suit against a clergyman beneficed in the province of York, in respect of an offence alleged to have been committed without that province.—*Noble v. Shier*, L.R. 11 P.D. 158.

Election :—

- (iv.) **Ch. D.**—*Power of Appointment—Will.*—A case for election may be raised by the attempted exercise by will of a power of appointment, which has in fact been waived.—*Re Brooksbank; Beauclerk v. James*, 56 L.J. Ch. 82; 55 L.T. 593; 35 W.R. 101.

Election (School Board) :—

- (v.) **Q. B. D.**—*Order of Education Department—Voting Paper.*—The regulations for elections of School Boards, contained in the rules of the Education Department are directory, and it is sufficient if they are substantially complied with. A voting paper ought not to be rejected for uncertainty, if it is apparent that the voter meant to exercise his franchise in favour of one or more of the candidates.—*Phillips v. Goff*, L.R. 17 Q.B.D. 805; 55 L.J. Q.B. 512; 35 W.R. 197.

Election (Municipal) :—

- (vi.) **C. A.**—*Election of Councillor—Eligibility of Alderman—Declaration of Election—Ballot Act (35 & 36 Vict., c. 36), s. 2.*—An alderman is eligible as town councillor, and his acceptance of that office vacates the office of alderman. The declaration of the numbers of votes at the poll by the returning officer amounts to a declaration of the election under the Ballot Act.—*Reg. v. Mayor of Bangor*, 35 W.R. 158.

Equitable Assignment.—*See Company*, p. 29, iv.

Evidence.—*See* Bankruptcy, p. 25, v. Patent, p. 37, i. Practice, p. 38, vii.; p. 40, ii. Probate, p. 43, iii.

Estoppel.—*See* Trover, p. 49, i.

Executor:—

(i.) **Ch. D.**—*Defaulting—Contempt of Court—Attachment—Debtors Act, 1869 (32 & 33 Vict., c. 62), s. 4.*—An executor who was in a fiduciary position towards his testator, and became indebted to him in his lifetime, may be attached for default in paying the sum into Court in accordance with an order made in an action for administration of the testator's estate. But if the sum ordered to be paid in is partly composed of interest, an attachment cannot issue, as the interest has not been in the possession or under the control of the executor within the meaning of section 4 of the Debtors Act 1869.—*Re Hickey; Hickey v. Colmer*, 55 L.T. 588; 35 W.R. 53.

(ii.) **Q. B. D.**—*Services rendered to Estate before Constitution of Personal Representative—Ratification.*—In order to make the estate of a deceased person liable for services rendered before a personal representative is constituted, it must be shewn not only that they were for the benefit of the estate, but that they were rendered under a contract with some person who afterwards became authorised to bind the estate, and subsequently ratified the contract.—*Re Watson; e. p. Phillips*, L.R. 18 Q.B.D. 116.

See Administration, p. 23, iv.; p. 24, ii.

Foreign Land:—

(iii.) **Ch. D.**—*Condition of Holding—Liability to Perform.*—The Court recognises the liability to perform a condition attached by the law of a foreign country to the holding of land in that country, and a claim arising from a breach of such condition may be proved in England against the estate of a deceased holder of such land.—*Bathiany v. Walford*, L.R. 33 Ch. D. 624; 55 L.T. 509.

Gasworks:—

(iv.) **Q. B. D.**—*Annual Statements of Accounts—Special Act—Gasworks Clauses Act, 1871 (34 & 35 Vict., c. 41) ss. 1, 35.*—Special provisions as to the annual statements of accounts in a Private Act are not altered or superseded by the regulations in section 35 of the Gasworks Clauses Act, 1871.—*Leamington Priors Gas Co. v. Davis*, L.R. 18 Q.B.D. 107; 55 L.T. 784; 35 W.R. 123.

Highway:—

(v.) **H. L.**—*Main Road—Turnpike—Contribution by County to Repair.*—Decision of C. A. (*see* Vol. 10, p. 39, ii.) affirmed.—*Lancashire Justices v. Newton Commissioners*, L.R. 11 App. Cas. 416; 55 L.T. 615; 35 W.R. 185.

Husband and Wife:—

(vi.) **P. D.**—*Cruelty—Condonation—Revival.*—A persistent course of harsh irritating conduct, unaccompanied by actual violence, but carried to such a point as to endanger the petitioner's health, and renewed after the resumption of interrupted cohabitation: Held to constitute legal cruelty.—*Mytton v. Mytton*, L.R. 11 P.D. 141.

(vii.) **P. D.**—*Divorce—Cruelty—General Charge.*—Under a general charge of cruelty, evidence of a particular act of violence cannot be received, but the hearing may be adjourned that particulars may be furnished.—*Brook v. Brook*, L.R. 12 P.D. 19.

(i.) **C. A.—Divorce—Concurrent Suits in England and India—Stay of Proceedings.**—The Court will not stay proceedings in a suit for restitution of conjugal rights brought by a wife in England, till the determination of pending proceedings for a divorce commenced by the husband in India, and founded on alleged adultery committed there.—*Thornton v. Thornton*, L.R. 11 P.D. 176.

(ii.) **P. D.—Nullity of Marriage—Duress.**—The validity of a contract of marriage must be tested in the same manner as that of any other contract; and where the consent of a party to go through the ceremony of marriage is extorted by duress, the marriage may be declared null and void. Such duress may be exercised by threats of bankruptcy and exposure, and assurances that such bankruptcy and exposure could only be avoided by marriage.—*Scott v. Sebright*, L.R. 12 P.D. 21.

See Settlement, p. 45, iv.

Income Tax:—

(iii.) **Q. B. D.—5 & 6 Vict., c. 35, s. 60, r. 6—Public School.**—The exemption of public schools from income-tax is not confined to schools supported by charitable funds or endowments, nor to those commonly known as "the public schools," but comprises all schools which in their nature are public. The City of London School is such a public school.—*Blake v. Lord Mayor of London*, 35 W.R. 212.

Infant:—

(iv.) **C. A.—Maintenance—Charge on Real Estate.**—The Court has no jurisdiction to charge land for the past and future maintenance of infants who are entitled as successive tenants in tail in remainder.—*Cadman v. Cadman*, L.R. 33 Ch. D. 397; 55 L.J. Ch. 833; 55 L.T. 568; 35 W.R. 1.

Innkeeper:—

(v.) **H. L.—Duty of.**—The general duty of an innkeeper to take proper care for the safety of his guests does not extend to all parts of the house at all hours of night and day, but must be limited to those places into which guests may reasonably be expected to be likely to go, in a reasonable belief that they are entitled or invited to do so.—*Walker v. Midland Ry. Co.*, 55 L.T. 489.

Landlord and Tenant:—

(vi.) **C. A.—Contract for Lease—Representations—Restrictive Covenants—Collateral Agreement.**—A statement by a house-owner to a person negotiating for a lease that the form used for his leases contained certain restrictive covenants, amounts to a collateral agreement with the intending lessee that the neighbouring houses of the same owner should be managed in accordance with such restrictions.—*Martin v. Spicer*, L.R. 34 Ch. D. 1.

(vii.) **Q. B. D.—Covenant to leave in Repair—Measure of Damages—Indemnity—Proof against Surety—Bankruptcy Act, 1869 (32 & 33 Vict., c. 71), s. 31.**—The measure of damages in an action for breach of a covenant to leave premises in repair, is the amount required to put them in the state of repair originally contemplated, though from a change of circumstances they would be as valuable if in a worse state of repair. The liability of a surety who has agreed to indemnify against such a covenant was not proveable under the Bankruptcy Act, 1869, and therefore the bankruptcy of the surety in 1875 is no answer to an action on such agreement.—*Morgan v. Hardy*, L.R. 17 Q.B.D. 770.

- (i.) **C. A.**—*Distress—Gasfittings—Gasworks Clauses Act, 1847* (10 & 11 Vict., c. 15), s. 14.—A gas stove let for hire by a gas company is privileged against distress.—*The Gaslight and Coke Company v. Hardy*, L.R. 17 Q.B.D. 619; 55 L.T. 585; 35 W.R. 50.
- (ii.) **H. L.**—*Lease—Construction—Reservation or Regrant.—Decision of C. A.* (see Vol. 11, p. 12, iii.) affirmed.—*Houston v. Marquis of Sligo*.—55 L.T. 614.

Lands Clauses Act, 1845 :—

- (iii.) **Ch. D.**—*Incorporation with Special Act—Private Charity—Costs.*—A private charity having by special Act power of taking land by compulsion is not "an undertaking or work of a public nature" within the meaning of section 1 of the Lands Clauses Act, 1845, and therefore the provisions of that Act as to costs are not incorporated with the special Act.—*Re Sion College; e. p. Mayor, &c., of London*, 55 L.T. 589.
- (iv.) **C. A.**—*Incorporation of with Special Acts—Statutes 3 & 4 Vict., c. 87, and 9 & 10 Vict., c. 34—Compulsory Purchase—Costs of Payment out of Court*—*R.S.C.*, 1883, O. lxx., r. 1.—The Lands Clauses Act, 1845, is not incorporated with the Acts 3 & 4 Vict., c. 87, and 9 & 10 Vict., c. 34, and the Commissioners of Works cannot be ordered to pay the costs of payment out of moneys paid into Court on a compulsory purchase under those Acts. Rule 1 of Ord. 65 does not enable the Court to order payment of costs where it had no jurisdiction to do so before the Judicature Act.—*Re Mill's Estate*, L.R. 34 Ch. D. 24; 56 L.J. Ch. 60; 55 L.T. 465; 35 W.R. 65.

Libel :—

- (v.) **Ch. D.**—*Unfair Report of Proceedings.*—Where a defendant, in an action to restrain him from making certain representations, proves to the satisfaction of the judge that he had not made such representations, but an undertaking offered by him not to make them is embodied in the judgment, a circular by the plaintiffs stating that the defendant had been ordered to undertake not to make such representations, is an unfair report of the proceedings, and may be restrained by injunction as libellous.—*Hayward & Co. v. Hayward & Sons*, 55 L.T. 729.

Lien :—

- (vi.) **C. A.**—*Payment of Premiums on Policy—Salvage.*—A person gains no lien on a policy of insurance by paying the premiums, unless he can prove a request, express or implied, by the owner of the policy, or acquiescence by him with the knowledge that the payment was made under an erroneous belief as to title.—*Falcke v. Scottish Imperial Association*, 35 W.R. 143.

Limitations :—

- (vii.) **Ch. D.**—*Statute of—Intestacy—Commencement of Time.*—As regards leasehold property of an intestate, time begins to run against his administrator from the date of the death, not from the grant of administration.—*Re Williams; Davies v. Williams*, 55 L.T. 633; 35 W.R. 182.
- (viii.) **C. A.**—*Action Commenced—Death of Defendant—New Action.*—Where a creditor has commenced an action of debt within six years, and the defendant dies pending the action the creditor may, within a reasonable time, commence a new action, though the six years has expired.—*Swindell v. Bulkeley*, 35 W.R. 189.

- (i.) **Ch. D.**—*Express Trust—Mortgagee's Solicitor—Surplus Moneys.*—Where the mortgagee's solicitor retained the surplus moneys arising from a sale of the mortgaged property, the claim of the mortgagee against him for such moneys cannot be barred by lapse of time.—*Re Bell ; Lake v. Bell*, 35 W.R. 212.

Lunacy:—

- (ii.) **C. A.**—*Mortgage—Transfer—Trustee Act, 1850, s. 3*—The Court has jurisdiction to order the committee of a lunatic mortgagee to transfer the mortgage.—*Re Peel*, 55 L.T. 554; 35 W.R. 81.
- (iii.) **C. A.**—*Pending Enquiry—Allowance out of Estate of Alleged Lunatic.*—The Court may, pending an enquiry as to the soundness of mind of an alleged lunatic, sanction an allowance out of his estate for his household expenses, and for the expenses of preparing his defence on the enquiry.—*Re Bullock*, 55 L.T. 722; 35 W.R. 109.
- (iv.) **C. A.**—*One of several Mortgagees—Trustee Act, 1850, ss. 3, 5, 20.*—The Court has jurisdiction to appoint a person to convey the interest of a lunatic trustee in a mortgage, for the purpose of vesting the mortgaged estate in the continuing trustee and a new trustee.—*Re Jones ; Zincraft's Will trusts*, L.R. 33 Ch. D. 414; 55 L.T. 498; 35 W.R. 172.

Married Woman:—

- (v.) **Ch. D.**—*Separate Estate—Simple Contract Debt—Statute of Limitations.*—In the case of a claim against the separate estate of a married woman in the nature of a simple contract debt, the Court will act by analogy to the Statute of Limitations.—*Re Lady Hastings' estate, Hallett v. Hastings*, 55 L.T. 603; 35 W.R. 135.
- (vi.) **C. A.**—*Married Women's Property Act, 1882 (45 & 46 Vict., c. 75), ss. 5, 19—Settlement—After acquired Property.*—A legacy bequeathed to a married woman without a declaration as to separate use, is, by reason of section 19 of the Married Women's Property Act, 1882, and notwithstanding section 5 of the Act, bound by a covenant in her marriage settlement for the settlement of after acquired property other than that given to her separate use.—*Re Whitaker ; Christian v. Whitaker*, 35 W.R. 217.
- See Administration*, p. 24, i. *Mortgage*, p. 36, v. *Practice*, p. 40, ix. *Will*, p. 50, v.; p. 52, iii.

Master and Servant:—

- (vii.) **Q. B. D.**—*Liability for Negligence of Servant—Trinity House—Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104) ss. 389—423.*—The Trinity House is not a department of State so as to be exempt from liability for the negligence of its servants.—*Gilbert v. Trinity House*, L.R. 17 Q.B.D. 795; 55 L.T. 647; 35 W.R. 30.

Middlesex Registry:—

- (viii.) **Q. B. D.**—*Fees.*—Fees chargeable for registering a memorial of a deed are—1s. for "entry;" 1s. 6d. for "administering oath;" 1s. for endorsing certificate of oath; 1s. for certificate endorsed on deed.—*Munton v. Lord Truro*, L.R. 17 Q.B.D. 783.

Mine.—*See Railway*, p. 43, iv.

Mortgage:—

- (ix.) **Q. B. D.**—*Attornment—Bill of Sale—Practice—R.S.C., 1883, O. iii., r. 6.*—A mortgage by demise containing an attornment clause need not be registered as a bill of sale, though the mortgagee has not been in actual possession. The mortgagee, after entry for non-payment of the rent reserved, can recover possession upon a writ specially endorsed under Ord. 3, r. 6.—*Hall v. Comfort*, L.R. 18 Q.B.D. 11; 55 L.T. 550; 35 W.R. 48.

- (i.) **Ch. D.**—*Foreclosure—Receiver—Funds representing Corpus.*—Where a receiver is appointed after judgment for foreclosure, and there is a balance in his hands representing the *corpus* of the mortgaged property, the mortgagee is entitled to foreclosure absolute without further account.—*Welch v. National Cycle Works Co.*, 55 L.T. 673; 35 W.R. 137.
- (ii.) **Ch. D.**—*Foreclosure—Receiver.*—Moneys representing the gross takings in the business of the mortgaged property, a public house, being in the hands of the receiver, an order for foreclosure absolute was made, with a direction that the receiver should pay such moneys into Court and be discharged, liberty to apply in chambers as to such moneys being reserved to all parties.—*Holt & Co. v. Beagle*, 55 L.T. 592.
- (iii.) **C. A.**—*Foreclosure—Right to Rents Received after Certificate.*—A mortgagee of a mining property in case of foreclosure absolute is entitled to rents and royalties received by the receiver after the certificate, the judgment for foreclosure having provided that the person redeeming or mortgagee foreclosing should be at liberty to apply for payment of any money in the hands of the receiver.—*Coleman v. Llewellyn*, 56 L.J. Ch. 1; 35 W.R. 82.
- (iv.) **Ch. D.**—*Loan to Trader—Interest varying with Profits—Mortgage to secure Loan—Partnership Law Amendment Act, 1865 (28 & 29 Vict., c. 86), ss. 1, 5.*—A mortgagee of the interest of a person in an undertaking to secure a loan to him, the interest varying with the amount of profit, is not prevented from foreclosing his mortgage.—*Badeley v. Consolidated Bank*, 55 L.T. 635; 35 W.R. 106.
- (v.) **Ch. D.**—*Marshalling—Married Woman—Restraint on Anticipation.*—Where a married woman has created several incumbrances on different funds, as to some of which she is restrained from anticipation, the securities will be marshalled in favour of the incumbrancers who might otherwise lose their securities in consequence of the restraint on anticipation.—*Re Loder*, 55 L.T. 582; 35 W.R. 58.
- (vi.) **C. A.**—*Mortgages in Possession—Coal Mine—Coal Improperly Worked—Damage to Mine Subsequent to Judgment for Foreclosure—Accounts Added after Judgment.*—The mortgagee in possession of a leasehold coal-mine having sub-let the mine and allowed his sub-lessee to work out pillars of coal in contravention of covenants in the superior lease, will be charged with the value of the coal so wrongfully worked, allowing him the cost of bringing it to the surface, but not of severing it. Subsequently to the judgment *nisi* for foreclosure, the mortgagor alleged that the mortgagee had damaged the mine by improper working; a reference to an engineer was ordered to determine the amount, if any, of such damage, and it was ordered that the mortgagee should be charged therewith in the accounts directed by the judgment.—*Taylor v. Mostyn*, L.R. 33 Ch. D. 226; 55 L.J. Ch. 893; 55 L.T. 651.
See Colonial Law, p. 27, ii. *Practice*, p. 39, x. *Solicitor*, p. 47, vii. *Vendor and Purchaser*, p. 50, iii.

Partnership :—

- (vii.) **Ch. D.**—*Dissolution—Receiver—Judgment Creditor.*—In a partnership action an order for dissolution having been made and a receiver appointed, a creditor who had recovered judgment in an action brought after the dissolution, on a motion for leave to issue execution, obtained an order giving him a charge on the assets, on an undertaking to deal with them according to any order of the Court.—*Keowney v. Attril*, 55 W.R. 191.
See Mortgage, p. 36, iv.

Patent:—

- (i.) **Ch. D.**—*Particulars of Breaches—Privileged Communications—Relevancy of Evidence.*—A plaintiff having commenced an action for infringement of two patents for similar inventions, and having delivered particulars of breaches complaining of infringement of both patents without distinguishing between them, cannot, after discontinuing the action in respect of one patent, be called upon for further particulars of breaches. Communications by a patentee with his solicitor in the character of his patent agent are not privileged. Communications with a patent agent with respect to the preparation of one patent may contain evidence relevant to an action for infringement of another patent, where the inventions are closely connected.—*Moseley v. Victoria Rubber Co.*, 55 L.T. 482.
- (ii.) **P. C.**—*Patent Law Amendment Act, 1852, s. 41—Particulars of Infringement—Indian Act XV. of 1859, s. 34.*—The object of particulars of infringement is to give the defendant notice of the case he has to meet, and it is immaterial whether the information is given in the plaint or in a separate paper. Particulars of breaches are distinguished from particulars of objection for want of novelty, as in the former case the defendant must know whether, and in what respect, he has infringed a patent; therefore, a plaint referring to a machine of the defendant's, and stating that it infringed specified patents, is a sufficient compliance with the Act.—*Ledgard v. Bull*, L.R. 11 App. Cas. 648.
- (iii.) **Ch. D.**—*Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict., c. 57), ss. 26, 29, 32, 46.*—The validity of the defendant's patent cannot be contested in an action under section 32 of the Patents, Designs, and Trade Marks Act, 1883, the only issue being infringement or no infringement.—*Kurtz v. Spence*, L.R. 33 Ch. D. 579; 55 L.J. Ch. 919; 55 L.T. 317; 35 W.R. 26.
- (iv.) **Ch. D.**—*Practice—Application at Trial for Amendment of Particulars of Objection.*—An application during the trial of a patent action by the defendant for leave to amend his particulars of objections on the ground of the discovery of new facts, will be refused unless the defendant produces evidence of such new facts and shews that he could not have discovered them before; and the Court will not allow the plaintiff to be recalled and further cross examined for the purpose of proving such new facts.—*Moss v. Malings*, L.R. 33 Ch D. 603; 35 W.R. 165.
- (v.) **C. A.**—*Provisional and Complete Specifications—Objection for Disconformity—Further Particulars—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict., c. 57), s. 29, sub-s. 2.*—In an action for infringement of a patent, the defendant may be required to give further and better particulars of an objection made by him of disconformity between the provisional and complete specifications, so as to inform the plaintiff of the scope and nature of the objection.—*Anglo-American Brush Electric Light Corporation v. Crompton*, 55 L.T. 722; 35 W.R. 125.
- (vi.) **Ch. D.**—*Sufficiency of Specification—Improvement before final Specification.*—An inventor ought not to include in his final specification an improvement on the invention described in his provisional specification, which was not known to him at the time of the provisional specification.—*Edison & Swan Electric Light Co. v. Woodhouse & Rawson*, 55 L.J. Ch. 943.

Pension:—

- (vii.) **C. A.**—*Army Act, 1881 (44 & 45 Vict., c. 58), s. 141—Indian Pension Acts, 1871—Practice—Receiver—Ex parte Application.*—The pension for past services of a retired Indian officer, being inalienable by statute, cannot

be taken in execution. Ex parte applications for a receiver ought not to be granted, even after judgment, except in cases of emergency.—*Lucas v. Harris*, L.R. 18 Q.B.D. 127; 56 L.J. Q.B. 15; 55 L.T. 658; 35 W.R. 112

Poor Law :—

- (i.) **Q. B. D. & C. A.**—*Rating—Plant Capable of Removal.*—In assessing business premises, plant which is essentially necessary to the business and intended to remain as long as the premises are used for the business, may be taken into account, though not fixed so as to be part of the freehold, and though capable of removal without injury to itself or the freehold.—*The Tyne Boiler Works Company, Applicants; The Overseers of the Parish of Longbenton and The Assessment Committee of the Tynemouth Union, Respondents*, L.R. 17 Q.B.D. 651; L.R. 18 Q.B.D. 81; 35 W.R. 110.
- (ii.) **C. A.**—*Rateable Value—Hypothetical Yearly Tenant.*—In assessing the rateable value of Board Schools the School Board is to be considered as a possible hypothetical yearly tenant, and the value of the premises calculated by the rent which the Board would be willing to pay for them for use as schools.—*Reg. v. London School Board*, L.R. 17 Q.B.D. 738; 55 L.J. M.C. 169; 55 L.T. 384.
- (iii.) **Q. B. D.**—*Rateable Value.*—A college built for educational purposes, having been rated on an estimate of the lowest capital sum, for which premises providing similar accommodation could be erected, held that this, though relevant as evidence, was not the test of the rateable value, and that, in arriving at the rent which a hypothetical tenant might be expected to give, the possible competition of the occupying owner ought to be considered.—*Owens College v. Overseers of Chorlton-upon-Medlock*, 55 L.T. 737.
- (iv.) **Q. B. D.**—*Rating—Buildings used for Public Purposes.*—The Middlesex Sessions House being used by the justices for the purpose of the government of the country, is exempt from rates. The fact that part of the Sessions House is occupied by a servant of the justices as a residence does not render it rateable.—*Nicholson v. Holborn Assessment Committee*, 35 W.R. 230.
- (v.) **Q. B. D.**—*Settlement—Divided Parishes Act, 1876 (39 & 40 Vict., c. 61), s. 35.*—The word "wife" in 39 & 40 Vict., c. 61, s. 35, does not include a widow.—*Maidstone Guardians v. Holborn Guardians*, L.R. 17 Q.B.D. 817.

Practice :—

- (vi.) **Ch. D.**—*Action Relating to Land Abroad—Service out of Jurisdiction—R.S.C., 1883, O. xi., r. 1 (g).*—In an action to enforce against land in Trinidad the trusts of a creditor's deed, the defendants being persons in whom the legal estate was vested, leave was given to serve the writ on one of the defendants, a British subject residing in Trinidad, the other defendants having already been served, and evidence being given that by the law of Trinidad the beneficial interest in the land was bound by the deed.—*Jenney v. Mackintosh*, L.R. 33 Ch. D. 595; 55 L.T. 733; 35 W.R. 181.
- (vii.) **Ch. D.**—*Administration Action—Evidence after Judgment.*—On further consideration of an administration action against trustees, the judgment containing no special reservation as to costs, the plaintiffs may, in order to fix the defendants with costs, read evidence as to their conduct since the judgment, but not as to their conduct before action brought. *Semble*, evidence as to the conduct of the defendants before action brought may be read by a person who had been served with the judgment.—*Re Revill; Leigh v. Romney*, 55 L.T. 542.

- (i.) **C. A.**—*Affidavit—Description of Deponent—Costs.*—The word "gentleman" is not a sufficient description of the deponent in an affidavit as to the fitness of a proposed trustee; and the affidavit being useless the costs of it will be disallowed.—*Re Horwood*, 55 L.T. 373.
- (ii.) **C. A.**—*Appeal—Notice of.*—A notice of appeal is not bad by reason of being given for day not in the sittings.—*Hamling v. Elliott*, L.R. 34 Ch. D. 22; 55 L.T. 464; 35 W.R. 49.
- (iii.) **H. L.**—*Appeal—Time—Appellate Jurisdiction Act, 1876, Standing Order I.*—Appeal against the decision in *Phillips v. Homfray* (see Vol. 9, p. 112, viii.) dismissed, being out of time.—*Phillips v. Fothergill*, L.R. 11 App. Cas. 467; 55 L.T. 615.
- (iv.) **Ch. D.**—*Attachment—Breach of Undertaking—Service on Solicitor on the Record*—R.S.C., 1883, O. vii., r. 3; O. xlv., r. 2; O. lxvii., rr. 7, 8.—There is no distinction in regard to the service of notice of motion for leave to issue a writ of attachment, between breach of an undertaking and breach of an injunction. Service on the solicitor on the record is good though he has ceased to act shortly after the undertaking.—*Callow v. Young*, 53 L.T. 543.
- (v.) **Ch. D.**—*Attachment—Notice of Motion—Place of Hearing—Service of Affidavits*—R.S.C., 1883, O. xii., r. 10; O. lii., r. 4; O. lxvii., r. 2.—A notice that an attachment would be moved for at the Royal Courts of Justice is sufficient. Affidavits in support should be served with the motion at the address for service.—*Petty v. Daniell*, 35 W.R. 151.
- (vi.) **C. A.**—*Consent of New Trustees—Verification*—R.S.C., 1883, O. xxxviii., r. 19a. (Dec., 1885, r. 14).—Where a petition is presented in the Chancery Division and in Lunacy asking for the appointment of new trustees under the Chancery jurisdiction, and for a vesting order under the Lunacy jurisdiction, the consent of the new trustees is sufficiently verified by the signature of a solicitor.—*Re Hume; Trenchard's Will trusts*, 55 L.T. 414.
- (vii.) **C. A.**—*Costs—Shorthand Notes of Judgment.*—In future the costs of appeal will include the costs of the shorthand writer's notes of the judgment appealed from, unless otherwise specially ordered.—*Humphrey v. Sumner*, 55 L.T. 649.
- (viii.) **C. A.**—*Costs—Oppressive Action—Good Cause*—O. lxx., r. 1.—*Discretion of Judge.*—If, from the facts proved at the trial, it appears that an action has been brought or conducted oppressively by the plaintiff, that constitutes "good cause" so as to enable the judge to compel the successful plaintiff to pay the costs of both sides. If "good cause" exists, the Court of Appeal will not consider whether the judge has exercised his discretion rightly.—*Williams v. Ward*, 55 L.J. Q.B. 566.
- (ix.) **Q. B. D.**—*Costs—Action Referred—County Courts Act, 1867 (30 & 31 Vict., c. 142), s. 5*—R.S.C., 1883, O. lxx., r. 12.—In an action for breach of contract, which has been referred by consent, the costs to abide the event of the award, and the judgment on the award to be entered in the High Court, the costs may be taxed on the High Court scale, though the award is for less than £50.—*Hyde v. Beardsley*, 35 W.R. 140.
- (x.) **C. A.**—*Costs—Appeal for—Mortgage*—R.S.C., 1883, O. lxx., r. 1.—A mortgagor cannot appeal against the order of the Judge allowing costs to the mortgagee against whom charges of misconduct have been made.—*Charles v. Jones*, L.R. 33 Ch. D. 80; 55 L.T. 329; 35 W.R. 88.

- (i.) **C. A.**—*Costs—Security for—Appeal.*—An application by the respondent for security for cost of an appeal will be refused if not made till after the appellant has incurred the costs of the appeal, unless it is shewn that, until that time, the respondent has had no evidence of the appellant's insolvency.—*Pooley's trustee v. Whetham*, L.R. 33 Ch. D. 76; 56 L.J. Ch. 41; 55 L.T. 462.
- (ii.) **C. A.**—*Evidence Rejected at Hearing—Appeal—Examination de bene esse.*—Where the evidence of a witness has been rejected at the hearing of an action, and there is an appeal against that rejection, the witness, being dangerously ill, may be examined *de bene esse* before a special examiner pending the appeal; the appellant undertaking to abide by any order as to the costs of the application and examination.—*Solicitor to the Treasury v. White*, 55 L.J. P. 79.
- (iii.) **Ch. D.**—*Fund in Court—Carrying to Separate Account—Title of Account.*—Where, on a petition for payment out of a fund in Court, it is proposed to carry over the share of one of the beneficiaries to his separate account, the title of the account should be "the account of A. B." not "the account of A. B. or his incumbrances," the share not being in fact incumbered.—*Hargrave v. Kettlewell*, 55 L.T. 674; 35 W.R. 136.
- (iv.) **Ch. D.**—*Indemnity given to Defendant after Action brought—Third Party Notice—R.S.C., 1883, O. xvi., r. 48.*—Where the defendant has, since the issue of the writ, received an indemnity, the defendant ought to be allowed to issue a third party notice against the person giving the indemnity. The Court will not consider the merits of the claim for indemnity on an application for leave to issue the notice.—*Edison Electric Light Co. v. Jablockhoff Electricity Co.*, 35 W.R. 178.
- (v.) **C. A.**—*New Trustees—Reappointment—Vesting Order—Trustee Act, 1856, ss. 1, 2, 34, 35.*—The Court will not reappoint new trustees already duly appointed for the purpose of making a vesting order.—*Re Deuchirat*, L.R. 33 Ch. D. 416; 55 L.J. Ch. 842; 55 L.T. 427; 35 W.R. 147.
- (vi.) **Ch. D.**—*Order for Sale of Real Estate—R.S.C., 1883, O. li., r. 1.*—An action for an account of rents and profits of real estate is not "a cause or matter relating to real estate" so as to authorise an order for sale under Ord. 51, r. 1.—*In re Staines; Staines v. Staines.*—L.R. 33 Ch. D. 172; 55 L.J. Ch. 913; 35 W.R. 75.
- (vii.) **C. A.**—*Order for Inspection—Co-defendant—R.S.C., 1883, O. l., r. 3—O. xxxi., r. 12.*—An order for discovery or inspection may be granted as between co-plaintiffs or co-defendants, if there is some right to adjust between them in respect of which such an order would be useful.—*Shaw v. Smith*, 35 W.R. 188.
- (viii.) **Ch. D.**—*Originating Summons—R.S.C., 1883, O. lv., r. 3.*—The jurisdiction for determining questions on originating summons for administration, only applies to such questions as would have been determined by an action for administration.—*Re Carlyon; Carlyon v. C.*, 35 W.R. 155.
- (ix.) **C. A.**—*Pauper—Appeal—R.S.C., 1883, O. xvi., rr. 22, 23, 24.*—Where a party who has not sued or defended as a pauper in the Court below applies for leave to appeal in *formâ pauperis*, the Court will follow by analogy Order 16, rr. 22, 23, 24. Where a married woman suing by herself applies for leave to appeal in *formâ pauperis* her husband as well as herself must make the affidavit required by rule 22.—*Re Roberts; Kiff v. Roberts*, L.R. 33 Ch. D. 265; 55 L.J. Ch. 628; 55 L.T. 498; 35 W.R. 176.

- (i.) **Ch. D.**—*Petition—Service out of Jurisdiction—R.S.C., 1883, O. xi.*—Leave given to serve a petition for payment out of Court on persons out of the jurisdiction where the fund could not be dealt with without service on them.—*Colls v. Robins*, 55 L.T. 479.
- (ii.) **P. C.**—*Petition for Rehearing.*—In exceptional cases a petition will be reheard by the Privy Council, even after an Order in Council has been made; but this is an indulgence with a view mainly to do justice where, a party not having been heard, an order has been inadvertently made as if he had been heard. When an appeal has been fully heard and an Order in Council made, a rehearing will not be allowed even if a relevant case of new matter is made out.—*Venkata v. Court of Wards*, L.R. 11 App. Cas. 660.
- (iii.) **C. A.**—*Payment Out—Lands Clauses Act, 1845 (8 & 9 Vict., c. 18), s. 69—Charity.*—The purchase-money of land taken from the parson, churchwardens and parishioners of a parish was paid out to them on proof of their having spent the amount of the fund in repair of the church.—*E. p. the Parson, &c., of St. Alphage*, 55 L.T. 314.
- (iv.) **Ch. D.**—*Pleading—Embarrassing and Scandalous Matter, R.S.C., 1883, O. xix., r. 27.*—Where the plaintiff in his reply abandons his claim to relief in respect of charges contained in his statement of claim which affect the character of the defendant, such charges will be struck out as embarrassing and scandalous.—*Brooking v. Maudslay*, 55 L.T. 343.
- (v.) **H. L.**—*Pleading—Defence of Res Judicata—Estoppel.*—Decisions of C. A. (see Vol. 10, p. 112, vi., and Vol. 11, p. 117, ii.) affirmed.—*Concha v. Concha*, L.R. 11 App. Cas. 541; 55 L.T. 522.
- (vi.) **P. D.**—*Probate—Fresh Action—New Evidence—Stay of Proceedings—Costs.*—Where a person who has been privy to, and the real defendant in an action wherein he unsuccessfully attempted to establish a will, commences a fresh action as plaintiff to establish the same will on new evidence, the fresh action will be stayed till the costs of the successful parties to the prior action have been paid.—*Peters v. Tilly and others*, L.R. 11 P.D. 145; 55 L.J. P. 75; 35 W.R. 183.
- (vii.) **Ch. D.**—*Staying useless Accounts.*—A contract for sale having been cancelled for misrepresentation, and accounts having been ordered of the moneys expended by the plaintiffs on the property, and received by them in respect of it, with a declaration that they were entitled to a lien on the property for the balance, the accounts were stayed as a useless expense, it being shewn that the defendants were in liquidation, and had no assets except the property, which was of less value than the balance which would be due to the plaintiffs.—*The Hop Exchange Association, Limited, v. The Association of Land Financiers, Limited*, 56 L.J. Ch. 4; 55 L.T. 611.
- (viii.) **Ch. D.**—*Third Party—Indemnity after Action brought—R.S.C., 1883, O. xvi., r. 48.*—Leave may be given to the defendant to serve notice of a claim for indemnity on a third party, whether the indemnity has been given before or after action brought. On the application for leave the Court will not go into the merits of the action or the validity of the claim for indemnity.—*Edison and Swan United Electric Light Co. v. Holland*, L.R. 33 Ch. D. 497; 55 L.T. 587.
- (ix.) **C. A. & Ch. D.**—*Third Party Notice—Indemnity—Vendor and Purchaser—R.S.C., 1883, O. xvi., r. 48.*—An agreement to sell land, the vendor representing it to be free from incumbrances, does not contain an implied contract to indemnify the purchaser against incumbrances. The purchaser's right is to specific performance with compensation for

a defective title, and he cannot serve a third party notice on the vendor in an action by persons claiming rights over the land to restrain him from dealing with it.—*Birmingham & District Land Company v. L. & N. W. Ry. Co.*, 55 L.T. 544 & 698; 35 W.R. 178.

- (i.) **Ch. D.**—*Vesting Order—Form of.*—An order vesting a trust estate in new trustees for the estate which the last surviving trustee would have had if alive, or any form of order in which the heir is not named, will not be made unless it is inconvenient or impossible to identify the heir.—*Re Bishop of Sarum*, 55 L.T. 313.
- (ii.) **C. A.**—*Bill in Parliament—Sanction of Court—Committee of Bondholders.*—Leave given to a committee representing the bondholders of a public undertaking to promote a bill for carrying into effect certain terms of arrangement, the Court saying nothing in sanction of the proposed bill, and the costs of promoting the bill and applying to the Court being reserved.—*Buckham v. Trustees of the Town and Harbour of Whitehaven*, 55 L.T. 694.
- (iii.) **Ch. D.**—*Contempt—Chief Clerk's Summons—Witness—R.S.C.*, 1883, O. xxxviii., r. 13; O. lv., rr. 16, 17.—A defendant having been summoned by the chief clerk to attend in chambers to be examined and having disobeyed, is not guilty of disobedience to an order of the Court. He must be dealt with as a witness although a party to the action. An order must be made under rule 13 of Ord. 38 before a writ of attachment is issued.—*Powell v. Nevitt*, 55 L.T. 728.
- (iv.) **C. A.**—*Particulars—Alleged False Entries.*—The plaintiffs alleging by their statement of claim that the defendants had made false entries in the plaintiff's books, must, under an order that they should furnish particulars of the alleged false entries, give shortly the general nature of their objections to each alleged false entry, that the defendants may know the case they have to meet.—*Newport Slip Dry-Dock Co. v. Paynter* 55 L.T. 711.

See Bill of Sale, p. 26, ii. Colonial Law, p. 27, i. Mortgage, p. 35, ix., Patent, p. 37, iv. & v.

Principal and Agent :—

- (v.) **C. A.**—*Custom of Money Dealers—Pledge of Securities—Authority of Agent.*—The custom of London money dealers to pledge to banks for securing advances made to themselves, securities deposited with them to cover advances made by them, is not binding on a person dealing with them without knowledge of the custom. Where a person ignorant of such custom entrusts securities to a person with whom he is connected in financial operations for the purpose of pledging them, and such person being aware of the custom pledges them to a money dealer, who pledges them to a bank; the bank is justified by the way in which the owner of the securities has dealt with them in believing that the money dealer had the *jus disponendi*, and having obtained the legal estate may hold the securities till the amount of its advance is repaid.—*Easton v. London Joint Stock Bank*, 55 L.T. 67; 35 W.R. 220.

See Administration, p. 24, ii.

Principal and Surety.—See Administration, p. 24, i. Colonial Law, p. 27, v.

Private Bill Costs :—

- (vi.) **C. A.**—*Stat. 28 Vict., c. 27, ss. 2, 5—Signing Judgment—Power of Defendant to Defend.*—Where the promoters of a Private Bill in Parliament have been awarded costs against petitioners by the committee, and have issued a writ specially endorsed for such costs, the

officer of the Court must sign judgment on production of the writ, the certificate of the taxing master of the House, and an affidavit of demand. The defendants may not defend without leave, which will be granted if they have a question of jurisdiction to raise.—*Maillett v. Hanley*, 35 W.R. 201.

Probate:—

- (i.) **P. D.**—*Codicil—Only Testamentary Paper.*—Where the only testamentary paper forthcoming is a codicil not revoked according to law, it must be admitted to probate, though dependent in its language on a will which does not appear to be executed and cannot be proved.—*Gardiner v. Courthope*, L.R. 12 P.D. 14.
- (ii.) **P. D.**—*Costs—Interveners.*—Where interveners have been cited to appear by unsuccessful defendants and been charged with undue influence, their costs as well as those of the executors will be ordered to be paid by the defendants.—*Tennant v. Cross*, L.R. 12 P.D. 4.
- (iii.) **H. L.**—*Lost Will—Evidence of Contents—Declarations of Testator.*—If a lost will is propounded for probate upon parol evidence of its contents, with evidence of a residuary bequest, but no sufficient evidence as to the rest of the will: *quære* whether probate should be granted of the residuary bequest alone, unless the Court is satisfied that it has before it substantially the intentions of the testator: *quære*, whether the post-testamentary declarations of the testator are admissible as evidence of the contents.—*Woodward v. Goulstone*, L.R. 11 App. Cas. 469.

Railway:—

- (iv.) **Ch. D.**—*Mineral Estate Intersected by Railway—Right of Way—Railways Clauses Act, 1845 ss. 77, 81.*—The owner of the minerals under a piece of land of which a railway company owns the surface, and which is divided from other mines of the same owner by the railway, the minerals under which have been purchased by the company, is not entitled to a right of way over the line, and can only work his minerals by means of communications provided under the Railways Clauses Act, but having made such communications may enter upon the surface of the land owned by the company for the purpose of working the minerals thereunder.—*Midland Railway Co. v. Miles*, L.R. 33 Ch. D. 632; 55 L.T. 428; 35 W.R. 76.
- (v.) **C. A.**—*Railway and Canal Traffic Act, 1874, s. 7.*—Decision of Q. B. D. (see Vol. 11, p. 94, vi.) reversed.—*Dickson v. G. N. R.*, 35 W.R. 202.
- (vi.) **H. L.**—*Negligence—Onus of Proof—Contributory Negligence.*—The onus of proof being on the plaintiff, he cannot recover damages under Lord Campbell's Act against a Company for their negligence causing death, where there is no evidence to shew how the accident happened, or to disprove contributory negligence.—*Wakelin v. L. & S. W. Ry.*, 55 L.T. 709; 35 W.R. 141.
- (vii.) **C. A.**—*Receiving House—Liability for Theft by Servant—Carriers Act, ss. 5, 8.*—A clerk at a booking office not belonging to a railway company but advertised by them as a receiving house for goods, is a servant of the company within section 8 of the Carriers Act, and the company is liable for goods stolen by him.—*Stephens v. L. & S. W. Ry.*, L.R. 18 Q.B.D. 121; 35 W.R. 161.

Receiver:—

- (viii.) **C. A.**—*Interference—Slander of Title—Contempt of Court—Committal.*—Slander of title of the business carried on by a receiver and manager appointed by the Court is an act of contempt, and is properly punished by committal, when the offender refuses to undertake not to repeat his offence.—*Helmore v. Smith; s. p. Smith*, 35 W.R. 157.

Registration :—

- (i.) **Q. B. D.**—*Police Constable*.—The name of a metropolitan police constable was properly expunged from the register though no objection had been made.—*Doulon v. Halse*, 56 L.J. Q.B. 41.
- (ii.) **Q. B. D.**—*Lodger Franchise—Claim*.—The name of a lodger already on the register who neglects to make his claim according to section 22 of the Registration Act, 1878, should, on objection made, be expunged.—*Hersant v. Halse*, 56 L.J. Q.B. 44.
- (iii.) **Q. B. D.**—*Parochial Relief—Midwife—Medical Relief Disqualification Removal Act, 1885 (48 & 49 Vict., c. 46)*.—The attendance of a midwife instead of a medical man, by order of the relieving officer, on a wife does not disqualify her husband from being registered.—*Honeybone v. Hambridge*, 56 L.J. Q.B. 46.
- (iv.) **Q. B. D.**—*Soldier—Absence on Duty*.—A non-commissioned officer absent on duty for twenty-seven days during the qualifying period is not entitled to be registered.—*Spittal v. Brook*, 56 L.J. Q.B. 48.

Restraint of Trade :—

- (v.) **Ch. D.**—*Covenant—Assignment of Good-will*.—A covenant not to carry on a business for five years under a particular name is not void though unlimited as to space. The assignor of the good-will of a business cannot be restrained from soliciting the customers of the business.—*Vernon v. Hallam*, 55 L.T. 676; 35 W.R. 156.

Riparian Owner :—

- (vi.) **C. A.**—*Conveyance by—Bed of River*.—The conveyance by a riparian owner of land bounded by a river includes half the bed of the river, although the area mentioned in the conveyance and the map therein referred to do not include such half of the bed.—*Micklethwait v. Newlay Bridge Company*, L.R. 33 Ch. D. 133; 55 L.T. 336.

Scotch Law :—

- (vii.) **H. L.**—*Appeal—Question of Fact—Interdict*.—A finding by an inferior Court that the burning of certain heaps of refuse would cause material discomfort is a finding of fact and not of law. The wording of an interdict against a nuisance ought not to exclude scientific attempts to attain the desired object without causing a nuisance.—*Fleming v. Hislop*, L.R. 11 App. Cas. 686.
- (viii.) **H. L.**—*Bridge—Roads and Bridges (Scotland) Act, 1878 (41 & 42 Vict., c. 51), ss. 37 and 88*.—The provisions of section 88 of the Roads and Bridges (Scotland) Act, 1878, are applicable to bridges situated in more than one county or burgh.—*Provost of Glasgow v. Police Commissioners of Hillhead*, L.R. 11 App. Cas. 699.
- (ix.) **H. L.**—*Market—Power of Grantee*.—A corporation, grantee of a market, is not in virtue of powers of administration and control vested in it by Act of Parliament, entitled to deprive the public of the use of the market building.—*Magistrates of Edinburgh v. Blackie*, L.R. 11 App. Cas. 665.

Sewer :—

- (x.) **C. A.**—*Metropolis Local Management Act, 1855 (18 & 19 Vict., c. 120, ss. 68, 78, 74, 75, 76, 250)—Draining by "Combined Operations"*.—A drain conveying the sewage of several houses into the public sewer, laid and connected with the sewer after notice to the Local Board, and without objection from them, is a "drain" and not a "sewer" within the meaning of the Metropolis Local Management Act, 1855.—*Bateman v. Poplar Board of Works*, L.R. 33 Ch. D. 360; 55 L.T. 374.

Settled Land:—

- (i.) **C. A.**—*Settled Land Act, 1882* (45 & 46 Vict., c. 38), s. 2, sub-ss. 5, 7, s. 58, sub-s. (1), clause (vi).—*Estate or Interest in Possession*.—Where lands are devised to trustees for a term of 20 years on trust to manage and pay annuities and accumulate the residue of the rents, and after that term to be settled by reference to another settlement, the tenant for life in possession under that settlement is not a tenant for life nor a person having the powers of a tenant for life of or with respect to the land settled by the will.—*Re Strangways; Hickley v. Strangways*, 55 L.T. 714; 35 W.R. 83.
- (ii.) **C. A.**—*Copyholds—Sale by Tenant for Life—Fines—Settled Land Act, 1882, s. 20* (3).—Where a copyhold, devised to a trustee on trust for a tenant for life and remaindermen, is sold by the tenant for life before the trustee is admitted, and before the lord is entitled to seize for want of a tenant, one fine only is payable on the admission of the purchaser.—*Re Naylor & Spendla*, 35 W.R. 219.
- (iii.) **Ch. D. & C. A.**—*Settled Land Act, 1882, ss. 3, 15, 50—Sale of Mansion House—Assignees of Tenant for Life—Consent*.—The Court will not, on the application of a tenant for life, who has mortgaged his life interest to an extent exhausting the whole income, order the sale of a mansion house without the consent of the trustees, without full information as to the proposed sale, and the consent of the mortgagees. *Semble*, that in such a case, if the tenant for life sells the settled land other than the mansion house subject to the mortgagees, the trustees ought to accumulate the purchase-money for the benefit of the remainder man.—*Re Sebright's settled estates*, L.R. 33 Ch. D. 429; 55 L.T. 354 & 570; 35 W.R. 49.
- (iv.) **Ch. D.**—*Lease—Sanction of Court—Covenant to Renew Lease—Settled Estates Act, 1877* (40 & 41 Vict., c. 18) ss. 4, 5—*Appointment of New Trustees—Recital in Deed*.—The Court cannot sanction a sub-lease of settled land (held under a renewable lease) for the unexpired residue of the term granted by the head lease, with a covenant to renew the sub-lease after renewal of the head lease. A power for continuing trustees to appoint new trustees may be exercised by a statement in a renewed lease of part of the trust property that the new lessees are the "present trustees," the continuing trustee being party to the new lease, and the same being expressed to be made by his direction.—*Re Farnell's settled estates*, L.R. 33 Ch. D. 599.

See Tenant for Life, p. 48, iii.

Settlement:—

- (v.) **Ch. D.**—*After-acquired Property Clause*.—In a marriage settlement, in which there are no recitals, a covenant by the husband alone to settle after-acquired property of the wife, followed by an agreement that, until settled, such property should be held upon the trusts upon which it was covenanted to be settled, does not bind property to which the wife becomes entitled to her separate use.—*Re Macpherson's estate; Macpherson v. Macpherson*, 55 L.J. Ch. 922; 55 L.T. 346.

Ship:—

- (vi.) **C. A.**—*Bill of Lading—Quality Marks*.—A shipowner is not bound by statements in a bill of lading as to the quality marks on goods.—*Cox v. Bruce*, L.R. 18 Q.B.D. 147; 35 W.R. 207.

- (i.) **C. A.**—*Bill of Lading—Exceptions*—"Damages and Accidents of the Seas."—Damage to goods on board ship by sea-water escaping from a pipe which had been gnawed by rats does not come within the exception of "damages and accidents of the seas."—*Pandorf & Co. v. Hamilton, Fraser & Co.*, L.R. 17 Q.B.D. 670; 55 L.J. Q.B. 673; 55 L.T. 499; 35 W.R. 70.
- (ii.) **C. A.**—*Charter-Party—Exception of "Dangers and Accidents of the Seas"*—Collision Caused by Negligence.—Damage to a ship's cargo caused by a collision owing solely to the negligence of another ship is within the exception in a charter-party of "dangers and accidents of the seas, rivers, and navigation."—*Sailing Ship Garston Co. v. Hickie, Borman & Co.*, L.R. 18 Q.B.D. 17; 56 L.J. Q.B. 38; 35 W.R. 33.
- (iii.) **C. A.**—*Charter-Party—Bill of Lading—Measure of Damages.*—A clause in a bill of lading, which was not in the charter-party, limiting the liability of the owners, does not control the contract in the charter-party. In an action by the vendor of goods sold "to arrive" against the shipowner for loss of the goods, the measure of damages is the market value at the port of discharge at the time when the cargo should have arrived. Judgment of Q. B. D. (see Vol. 12, p. 17, ii.) varied.—*Rodocanachi v. Milburn*, L.R. 18 Q.B.D. 67.
- (iv.) **C. A.**—*Charter-Party—Loading at Ship's Risk—Excepted Perils.*—A provision in a charter-party that cargo is to be loaded at ship's risk, means at such risk as would attach if the cargo were on board, and the shipowner is not liable for goods lost during loading by reason of one of the excepted perils.—*Nottebohn v. Richter*, L.R. 18 Q.B.D. 63; 56 L.J. Q.B. 33.
- (v.) **C. A.**—*Collision—Regulations for Preventing Collisions at Sea.*—The entrance channel to Cardiff Docks is a narrow channel within Art. 21 of the Regulations for Preventing Collisions at Sea, and Arts. 16 & 22 are also applicable.—*The Leverington*, L.R. 11 P.D. 117; 55 L.J. P. 78; 55 L.T. 386.
- (vi.) **P. D.**—*Compulsory Pilotage—Tyne.*—Pilotage within the Tyne pilotage district is voluntary for all vessels not being home trade passenger ships within section 354 of the Merchant Shipping Act, 1854.—*The Johanna Sverdrup*, 35 W.R. 63.
- (vii.) **H. L.**—*Insurance—Repairs—Cleaning—Dock Dues—Liability for.*—Where a ship is put into dock and is there both repaired and cleaned, the underwriters of a marine insurance policy being liable for the expense of repairing but not of cleaning, the dock dues are to be attributed in equal moieties to the expenses of repairing and cleaning respectively, so that the underwriters are liable for half such dues.—*The Marine Insurance Co. v. The China Transpacific Steamship Co.*, L.R. 11 App. Cas. 573; 55 L.T. 491; 35 W.R. 169.
- (viii.) **P. D.**—*Maritime—Lien—Wages.*—Seamen have a maritime lien for wages on freight due under a sub-charter, in priority to light and dock dues, and can arrest the cargo to enforce their lien.—*The Andalina*, L.R. 12 P.D. 1.
- (ix.) **P. D.**—*Salvage—Compromise—Mistake of Facts.*—A compromise of a salvage suit made under a mistake as to facts is not binding on the salvors.—*The Monarch*, L.R. 12 P.D. 5.

- (i.) **P. D.**—*Salvage—Government Transport—Government Stores.*—The owners, master, and crew of a ship chartered to Government as a transport, under the transport regulations, which provide that "when necessary steam transports will be required to tow other vessels," are entitled to salvage for services rendered to another vessel and her freight, though the services are rendered with the aid of naval officers and seamen, and though the vessel salvaged is laden partly with Government stores.—*The Bertie*, 55 L.T. 520.
- (ii.) **P. D.**—*Non-Delivery of Cargo—Transshipment.*—A shipowner, who is prevented from delivering his cargo by a cause other than a peril excepted in the bill of lading, may carry out his contract by transshipping the cargo, but remains liable for the completion of the contract. His liability to pay damages for the non-delivery of the cargo by the vessel into which it is transhipped is not affected by the decree in a limitation of liability suit which he has instituted in respect of the accident which prevented him from delivering it in his own vessel.—*The Bernina*, 35 W.R. 214.

Solicitor:—

- (iii.) **Ch. D.**—*Administration Action—Trustee—Profit Costs.*—A solicitor, being an executor to estate administered in a creditor's action, and acting as solicitor for the executors, is entitled to profit costs of the action, but not of business not done in the action; the rule applies to business done both before and after he proved the will.—*Re Barber; Burgess v. Vinnicombe*, L.R. 34 Ch. D. 77.
- (iv.) **Ch. D.**—*Costs—Taxation—General Order, August, 1882—Time of Undertaking Business—Notice of Election to first Mortgagee.*—After a solicitor has undertaken employment and done any work in it for his client, it is too late for him to elect under rule 6 of the General Order to be remunerated otherwise than by scale. Notice of election as to his remuneration given by a solicitor to his client, the first mortgagee, is binding on the second mortgagee and the mortgagor.—*Hester v. Hester*, 55 L.T. 669.
- (v.) **C. A. & Ch. D.**—*Taxation—Election as to Scale—General Order of August, 1882, r. 6.*—The right of a solicitor to elect to be remunerated under schedule 2 instead of schedule 1, cannot, as a general rule, be exercised after he has accepted his employment, and done any work in it for which he could charge if the scale did not apply.—*Re Allen*, 56 L.J. Ch. 6; 55 L.T. 630; 35 W.R. 100 & 218.
- (vi.) **C. A.**—*Investment of Client's Moneys—Declaration of Trust—Evidence—Defence of Purchase for Value without Notice.*—Decision of Ch. D. (see Vol. 11, p. 132, vi.) affirmed.—*Re Vernon Evens & Co.*, L.R. 33 Ch. D. 402; 56 L.J. Ch. 12; 55 L.T. 416; 35 W.R. 225.
- (vii.) **C. A.**—*Mortgage by Client—Unusual Power of Sale.*—Decision of Ch. D. (see Vol. 11, p. 97, vi.) affirmed.—*Pooley's trustees v. Whetham*, L.R. 33 Ch. D. 111; 55 L.J. Ch. 899; 55 L.T. 933.
- (viii.) **Ch. D.**—*Solicitor Discharged before Trial—Priority of Lien for Costs of Solicitors Employed in Succession—23 & 24 Vict., c. 127, s. 28.*—The solicitor who is employed at the time when a fund is actually recovered has the first lien on the fund for costs, and a charging order obtained by a solicitor who was discharged before trial is subject to that lien.—*Re Wadsworth; Rhodes v. Sugden*, 55 L.T. 596; 35 W.R. 75.

- (i.) **Q. B. D.**—*Discharge by Solicitor—Lien on Papers.*—Where a solicitor applies to his client for funds to carry on the suit, under a special agreement in the retainer that they should be supplied, and on the client refusing to supply them declines to carry on the suit, he discharges himself, and can be ordered to deliver to a new solicitor the papers requisite for the suit before payment of his taxed costs.—*Bluck v. Lovering & Co.*, 35 W.R. 232.
- (ii.) **Ch. D.**—*Taxation of Costs*—"Investigating Title."—Where property was vested in the vendors by Act of Parliament "to be appropriated to such purposes as the Lord Chancellor should direct," the purchaser's solicitor having asked for, and obtained a copy of, the Lord Chancellor's directions that the property should be sold was held entitled to the scale fee as having "investigated the title."—*E. p. Mayor, &c.*, of London, 35 W.R. 210.

See Patent, p. 37, i.

Tenant for Life:—

- (iii.) **C. A.**—*Leasehold—Repairs—Trustee—Discretionary Power to Sell.*—The beneficial tenant for life of leaseholds under a will is under no obligation to keep them in such repair as to satisfy the covenants in the leases. The trustees will not be ordered to exercise a discretionary power of sale of the leaseholds given by the will.—*Re Courtier; Coles v. Courtier; Courtier v. Coles*, 55 L.T. 574; 35 W.R. 85.

Trade Mark:—

- (iv.) **Ch. D.**—*Registration—Fancy Word—Patents, Designs, and Trade Marks Act, 1883* (46 & 47 Vict., c. 57) s. 64, sub-s. 1 (c).—*Prior user—Fraud.*—The word "Gem" as applied to air guns is a fancy word and can be registered as a trade mark. The prior user of the word in fraud of the applicant by his agent does not deprive him of his right to register.—*Re Arbenz Trade Mark Gem*, 55 L.T. 480.
- (v.) **C. A.**—*Registration—Pictorial Representation of Article Used—T.R.A.*, 1875, s. 10.—Decision of Ch. D. (see Vol. 11, p. 98, iv.) reversed.—*Re James' Trade Mark; James v. Soulby*, L.R. 33 Ch. D. 392.—See *James v. Parry*, 55 L.J. Ch. 915; 55 L.T. 415; 35 W.R. 66.
- (vi.) **Ch. D.**—*Registration—Abandoned Application—Trade Marks Registration Act, 1875*, s. 3—*Patents, Designs, and Trade Marks Act, 1883*, ss. 63, 76, 113—*Test of User.*—A foreigner, applying for registration of a trade mark through the Trade Marks' Protection Society, makes the society his agent, and, if through the negligence of the agent the registration is not duly proceeded with, must be considered to have abandoned the application. He will, however, be allowed to make a fresh application, and is not precluded by the fact that another person has for five years been the registered owner of a similar mark. The test of user of a trade mark in England is whether goods marked with it have appeared as vendible articles in the English market.—*Jackson & Co. v. Napper; re Schmidt's Trade Mark*, 35 W.R. 228.

Tramway:—

- (vii.) **C. A.**—*Paving—Local Authority—Arbitration—Tramways Act, 1870* (33 & 34 Vict., c. 78), s. 33.—Where a tramway company which is required by its Act to pave the road to the satisfaction of the local authority, has laid down paving not approved by such authority, the difference ought to be referred to a referee under the Tramways Act, 1870, and the company will not without such reference be ordered to take up the pavement.—*Reg. v. Croydon & Norwood Tramway Co.*, L.R. 18 Q.B.D. 39.

Trover:—

- (i.) **Q. B. D.**—*Estoppel—Wharfinger's Warrants.*—A wharfinger who issues a warrant stating that it is the only document representing the goods is estopped from denying that the goods are in his custody, and when they have without his knowledge been delivered to a person not holding the warrant, is liable in trover to a purchaser of the warrant.—*Seton v. Lafone*, L.R. 18 Q.B.D. 139.
- (ii.) **C. A.**—*Conversion—Post Office Order—Negotiable Instruments.*—Post Office orders are not negotiable instruments in the hands of bankers. A banker who innocently cashes and credits to a customer post office orders paid in by him for that purpose which really belong to another person has wrongfully converted the same.—*Fine Art Society v. Union Bank*, L.R. 17 Q.B.D. 705; 55 L.T. 536; 35 W.R. 114.

Trustee:—

- (iii.) **Ch. D.**—*Appointment of New Trustees—Reduction of Number—Special Circumstances.*—On an appointment of new trustees by the Court, the difficulty of obtaining the consent of a sufficient number of persons to make up the original number, is a sufficient reason for reducing the number. *Quere* whether it is necessary to shew special circumstances to enable the Court to reduce the number.—*Re Fowler's trusts*, 55 L.T. 546.
- (iv.) **Ch. D.**—*Bankrupt—Removal of—Discretion of Court.*—The Court will in the exercise of its discretion remove a trustee who has been bankrupt and recently obtained his discharge.—*Re Foster's trusts*, 55 L.T. 479.
- (v.) **Ch. D.**—*Investment—"Real Securities."*—A power to invest in "real securities" does not authorise the investment upon long terms of years created for raising portions.—*Leigh v. Leigh*, 55 L.T. 634; 35 W.R. 121.
- (vi.) **C. A.**—*Investment—Mortgage of Trade Property.*—Decision of Ch. D. (see Vol. 11, p. 134, v.) affirmed.—*Re Whiteley*; *Whiteley v. Learoyd*, L.R. 33 Ch. D. 347; 55 L.J. Ch. 864; 56 L.T. 564.
- (vii.) **Ch. D.**—*Investment—Negligence—Employment of Broker.*—A trustee will not be freed from liability by following the usual course of business unless it is also prudent. Where a trustee, being a stockbroker, is employed by his co-trustees to make changes in the investments of the trust funds, and the funds have been lost through the misappropriation of his clerk, the other trustees are liable for neglecting to make enquiries which, if made, might have caused the recovery of the funds.—*Bullock v. Bullock*, 55 L.T. 703.

See Lunacy, p. 35, iv. Practice, p. 42, i. Settled Land, p. 45, iv. Will, p. 51, vi.

Vendor and Purchaser:—

- (viii.) **Ch. D.**—*Contract for Sale—Death of Vendor before Completion—Rescission—Conversion—Dower.*—A vendor having died before completion, having devised all his real estate on trust for sale, there is no conversion of the estate in equity where the contract has to be rescinded in consequence of the want of title of the testator. A legacy to the widow out of the proceeds of sale is a devise of an interest in land within the meaning of the Dower Act, and the widow is barred of her dower.—*Re Thomas*; *Thomas v. Howell*, 56 L.J. Ch. 9; 55 L.T. 629.

- (i.) **Ch. D.—Contract—Statute of Frauds—Description of Vendor—Verbal Notice to Purchaser.**—A contract describing the person selling, and in whom the legal estate was actually vested, as “the vendor,” and whereby the person who was the equitable owner was mentioned only as the vendor’s solicitor, and agreed as such to complete the sale, is not a valid contract within the Statute of Frauds; and the fact that the purchaser was verbally informed who was the equitable owner, does not make it valid.—*Jarret v. Hunter*, 55 L.T. 727; 35 W.R. 132.
- (ii.) **C. A.—Rents and Profits—Sale by Contract.**—Decision of Ch. D. (*see* Vol. 11, p. 135, i.), affirmed. A receiver being in possession of the rents, a direction was inserted in the order that he should pay them to the purchaser.—*Re Smith; Day v. Bonaini*, 55 L.T. 329.
- (iii.) **Ch. D.—Sale under Power in Mortgage Deed—Receipt for Purchase Money.**—When the sum due on security of a mortgage belongs to two different sets of trustees in unequal shares, the purchaser, on a sale under the power in the mortgage deed, is entitled only to a joint receipt for the purchase money, and cannot require it to be apportioned among the vendors.—*Re Parker and Beech’s Contract*, 55 L.J. Ch. 815.
- See Practice*, p. 41, ix.

Water Company:—

- (iv.) **C. A.—Works in Street—Waterworks Clauses Act, 1847 (10 & 11 Vict., c. 17), ss. 28, 32—Metropolis Water Act, 1852 (15 & 16 Vict., c. 84), s. 26—Metropolis Water Act, 1871 (34 & 35 Vict., c. 113), ss. 17, 24.**—A water company has power to place in the pavement of a street covers and guard boxes for the protection of stop-valves which are required by a regulation of the company made under statutory power, so long as the substantial reinstatement of the surface is not interfered with.—*East London Waterworks Co. v. Vestry of St. Matthew, Bethnal Green*, 55 L.J. Q.B. 571; 35 W.R. 37.

Will:—

- (v.) **Ch. D.—Construction—Married Woman—Restraint on Anticipation.**—A testator, in exercise of a power of appointment over settled funds, appointed that a share should be held on trust for a married woman for her sole and separate use without power of anticipation; *Held*, that the share could not be paid or transferred to her.—*Re Grey’s settlements; Acaon v. Greenwood*, L.R. 34 Ch. D. 85.
- (vi.) **Ch. D.—Construction—“Died Intestate without having been Married.”**—A gift to the persons who would have been entitled to the personal estate of A. B., if she had died intestate without having been married, is a gift to her collateral relations to the exclusion of her lineal descendants.—*Re Watson’s trusts*, 55 L.T. 316.
- (vii.) **C. A.—Construction—Division per stirpes.**—Decision of Ch. D. (*see* Vol. 11, p. 136, i.) affirmed.—*In re Campbell’s trusts*, L.R. 33 Ch. 96; 55 L.J. Ch. 911; 55 L.T. 463.
- (viii.) **Ch. D.—Construction—Gift over—Implication.**—A gift over, though in terms made only on the death of the donee of the prior interest, is to be extended by implication so as to take effect on the determination of that issue by marriage.—*Stanford v. Stanford*, 35 W.R. 191.
- (ix.) **Ch. D.—Construction—Execution of Power—Special Power—General Devise.**—The question whether a testator has exercised a power of appointment is solely one of intention, and where a testator, having a special power over real estate and no real estate of his own, makes a

- general devise of real estate on trusts which, to a great extent, were in excess of the power, there is no sufficient evidence of an intention to execute the power.—*Re Mills*; *Mills v. Mills*, 55 L.T. 665; 35 W.R. 133.
- (i.) **Ch. D.**—*Construction—General Bequest—Exercise of Power of Appointment*—*Wills Act* (1 Vict., c. 26), s. 27.—A general bequest made by A. is a good exercise of a power given by will to appoint that any sum not exceeding a sum named should be raised and paid to such persons as A. should appoint.—*Re Jones*; *Greene v. Gordon*, L.R. 34 Ch. D. 65; 56 L.J. Ch. 58; 55 L.T. 597; 35 W.R. 74.
- (ii.) **Ch. D.**—*Construction—Wills Act, 1837, s. 15—Life Interest “null and void”—Acceleration—Accumulation*.—Where the gift of a life interest is made void by the legatee attesting the will, and the interests in remainder are to be ascertained and to take effect at a future time, there can be no acceleration, and there is no ground for accumulating the income, but there is an intestacy.—*Townsend v. Townsend*; *re T.*, 55 L.T. 674; 35 W.R. 153.
- (iii.) **Ch. D.**—*Construction—Word “Family”—Legacy to Trustees for Services*.—Children only are entitled under a gift in trust for a testator’s “family.” Where a legacy is given to trustees for their services and collecting rents, the trustees are not entitled to the legacy if they employ an agent at the expense of the estate to collect the rents.—*Jones v. Mason*; *re Muffett*, 55 L.T. 671.
- (iv.) **C. A.**—*Construction—Gift to Cousins*.—Cousins strictly means cousins related by consanguinity. But evidence of surrounding facts may be received to enable the Court to judge which of two claimants is entitled to a legacy: and a cousin by marriage whose married name was that given in the will was held entitled in preference to a cousin by birth whose maiden name was that given in the will, but whose name was changed by marriage, it appearing that the testator knew of the marriage.—*Re Taylor*; *Cloak v. Hammond*, 55 L.T. 640; 35 W.R. 186.
- (v.) **Ch. D.**—*Construction—Charitable Bequest*.—A direction to distribute “such part of my personal estate as the law permits to be appropriated by will to charitable purposes” among such “charities, societies, and institutions” as S. shall direct is a good charitable bequest; and the pure personality must be given to such charities as S. directs.—*Re Douglas*; *Obert v. Barrow*, 55 L.T. 388.
- (vi.) **Ch. D.**—*Construction—Substitutional Legacy—Consumable Articles—Direction to Trustees to keep House in Repair*.—The general rule that a legacy given by codicil in substitution for one in the will is subject to the same incidents as the original legacy is not ousted by the fact that one of such incidents cannot attach. A direction that a person may consume in a certain place as much of consumable articles as he requires does not constitute a gift of the whole of the articles. A direction to trustees to keep a house in repair does not bind them to do more, but if they should consider more to be necessary to prevent deterioration of the property they ought to apply to the Court for directions.—*Re Colyer*; *Millikin v. Snelling*, 55 L.T. 844.
- (vii.) **Ch. D.**—*Devise—Locke King’s Act—17 & 18 Vict., c. 113; 30 & 31 Vict., c. 69*.—The devise of a house to a person absolutely “to do with as she thinks proper,” the whole residuary estate being devised on trust for sale, does not shew a “contrary or other intention” within the meaning of Locke King’s Act, so as to exonerate the house from bearing its share of a mortgage debt affecting the whole of the testator’s estate.—*In re Smith*; *Hannington v. True*; *Giles v. True*, L.R. 33 Ch. D. 195; 55 L.J. Ch. 914; 55 L.T. 549; 35 W.R. 103.

- (i.) **P. D.**—*Execution—Witnesses—Revocation.*—A testator partly speechless made his testamentary wishes known to two persons, who made notes of them to which the testator attached his mark, and on the back of which they wrote their initials. *Held*, a testamentary paper duly witnessed. The witnesses having struck out their initials in the presence of the testator with his apparent acquiescence on the ground that they had taken on themselves too much responsibility. *Held*, not to amount to revocation.—*Margary v. Robinson*, L.R. 12 P.D. 8.
- (ii.) **C. A.**—*Power of Advancement—Exercise of.*—Decision of Ch. D. (see Vol. 12, p. 22, i.) reversed.—*Abram v. Aldridge*; *re Aldridge*, 55 L.T. 554.
- (iii.) **P. D.**—*Probate—Married Woman—Appointment of Executors—Married Women's Property Act, 1882 (45 & 46 Vict., c. 75).*—The will of a married woman dealing only with realty, but appointing executors, is entitled to probate where a portion of her estate consists of personalty vested in her by virtue of the Married Women's Property Act, 1882.—*In the Goods of Cubbon*, L.R. 11 P.D. 169; 55 L.J. P. 77; 55 W.R. 200.
See Charity, p. 26, v.

Quarterly Digest

OF
ALL REPORTED CASES,
IN THE
Law Reports, Law Journal Reports, Law Times
Reports, and Weekly Reporter,
FOR FEBRUARY, MARCH, AND APRIL, 1887.
By C. H. LOMAX, M.A., of the Inner Temple,
Barrister-at-Law.

Administration:—

- (i.) **Ch. D.**—*Contribution of Real Estate to Pay Debts—Portions Charged on Real Estate.*—Where real estate is settled with a term vested in trustees to raise portions, and the real estate has to contribute to aid the personal estate to pay debts, the portions must be paid in full, and the whole contribution must be borne by the settled real estate after payment of the portions, and the amount of contribution must be settled by the full value of the real estate, not by the value after deduction of portions.—*Saunders Davies v. Saunders Davies*, L.R. 34 Ch. D. 482; 56 L.T. 153.

- (ii.) **Ch. D.**—*Liability of Devisee to Debts—Alienation—Married Woman—Restraint on Anticipation*—11 Geo. IV. and 1 Will. IV., c. 47, ss. 6, 8—*Married Women's Property Act*, 1870, s. 12.—A devisee of land who has alienated is liable for the unpaid debts of the testator as if they were his own, to the extent of the value of the land alienated. A woman, devisee of land, having settled it on marriage on trust for herself for life without power of anticipation, her life interest is, to the extent of the value of the settled land, liable for the unpaid debts of the testator, notwithstanding the restraint on anticipation, her liability being "a debt contracted before marriage."—*Small v. Hedgeley*; *re Hedgeley*, L.R. 34 Ch. D. 379; 56 L.T. 19.

- (iii.) **Ch. D.**—*Mixed Fund for Debts, &c.—Payment Out of Personality—Contribution by Realty—Interest.*—Where a testator had in effect directed that his debts, legacies, &c., should be paid rateably out of his realty and personality, and the payments have been made out of personality without prejudice to the liability of the realty: *Held*, that the realty must make good its proportion with interest.—*Ashworth v. Munn*, L.R. 34 Ch. D. 391; 56 L.T. 86.
See Tenant for Life, p. 81, iii.

Administration (Letters of):—

- (i.) **P. D.**—*Application for Grant—Child—Proof of Birth and Death.*—On an application for grant of administration to the estate of a child the Court allowed its birth and death to be proved by evidence of declarations of its deceased mother.—*In the Goods of Thompson*, L.R. 12 P.D. 100; 56 L.J. P. 46; 35 W.R. 384.

Attachment:—

- (ii.) **C. A.**—*Person Acting in a Fiduciary Capacity*—*Auctioneer—Debtors Act*, 1869, s. 4, sub-s. 3.—An auctioneer who has received the purchase-money of property sold by him, and has failed to obey an order to pay it to the receiver in an action, is “a person acting in a fiduciary capacity,” and may be attached for disobedience.—*Crowther v. Elgood*, 35 W.R. 369.
- (iii.) **Ch. D.**—*R.S.C.*, 1883, O. xlv., rr. 1, 2—*Committal—Amendment.*—The distinction between attachment and committal, though for most purposes abolished, will be maintained in some cases. A plaintiff who had moved for a writ of attachment against a defendant for breach of an undertaking was allowed to amend his notice of motion by asking for committal as well as attachment.—*Callow v. Young*, 56 L.T. 147.

Bankruptcy:—

- (iv.) **Q. B. D.**—*Act of Bankruptcy—Notice by Agent of Suspension of Payment—Dealing with Property after Act of Bankruptcy—Bankruptcy Act*, 1883, s. 4, sub-s. 1 (h).—A circular issued by a debtor through an agent setting out a statement of his affairs and offering his creditors a composition, and stating that he had no other property and was going out of business, is an act of bankruptcy. With regard to dealing with the debtor's property after an act of bankruptcy his agent is on the same footing as other persons.—*Re Lamb*; *e. p. Gibson & Bolland*, 55 L.T. 817.
- (v.) **C. A. & Q. B. D.**—*Bankruptcy Rules*, 1883, r. 111.—In spite of section 104 of the Bankruptcy Act, 1883, r. 111, of the Bankruptcy Rules is not *ultra vires*.—*Re Hann*; *e. p. Foreman*, L.R. 18 Q.B.D. 393; 56 L.J. Q.B. 161; 55 L.T. 820; 35 W.R. 370.
- (vi.) **H. L.**—*Bankruptcy (Ireland) Amendment Act*, 1872, s. 47—*Proof—Valuation of Security.*—The mortgagees of a policy of insurance on the life of the mortgagor having, in the bankruptcy of the mortgagor, proved for the difference between his debt and the value of the policy, may not also prove for the value of a covenant by the mortgagor to pay the premiums.—*Deering v. Bank of Ireland*, L.R. 12 App. Cas. 20; 56 L.T. 66.
- (vii.) **Q. B. D.**—*Books of Account—Bankruptcy Act*, 1883, s. 28, sub-s. 3.—A tradesman has not failed to keep proper books of account by reason of failing to keep accounts of a transaction outside his proper business, the books of his business being properly kept.—*E. p. Board of Trade re Mutton*, 35 W.R. 456.
- (viii.) **Q. B. D.**—*Composition—Approval Refused—Stock Exchange Transactions—Bankruptcy Act*, 1883, ss. 18, 28.—The refusal of the County Court Judge to approve of a composition when the debtor had incurred large liabilities through gambling and Stock Exchange transactions is a proper exercise of discretion.—*Re Barlow*; *e. p. Thorner*, 56 L.T. 168.

- (i.) **C. A.**—*Composition—Special Resolution—Approval by Registrar—Discretion—Bankruptcy Act, 1883, ss. 18, 23, 28.*—A special resolution of creditors under section 23 of the Bankruptcy Act, 1883, entertaining a proposal for composition after an adjudication of bankruptcy must be confirmed at a second meeting of creditors in the same way as a special resolution under section 23, entertaining a proposal before adjudication. In exercising his discretion as to approval of a composition, the registrar must consider both the interest of the creditors and the conduct of the debtor, and is not bound to refuse approval because the debtor has committed an offence under section 28. The Court of Appeal will not review the registrar's discretion unless it is clear that he has exercised it wrongly.—*E. p. Kearsley; re Genese*, L.R. 18 Q.B.D. 168; 56 L.J. Q.B. 220; 56 L.T. 79.
- (ii.) **Q. B. D.**—*Discharge in County Court—Condition—Entry of Judgment—Amount exceeding £50—Fees—Bankruptcy Act, 1883, s. 28, sub-s. (6)—Bankruptcy Rules, 1886, r. 240.*—Where a bankrupt is discharged by the County Court Judge on condition that he should consent to entry of judgment against him for any unsatisfied balance of provable debts, judgment shall be entered in the County Court for such balance, though exceeding £50, and the registrar is not entitled to any fees in respect thereof.—*In re Howe*, 35 W.R. 380.
- (iii.) **C. A.**—*Fraudulent Preference—Restitution after Breach of Trust.*—Payments made previous to bankruptcy in restitution of a breach of trust by a person "unable to pay his debts as they become due" cannot be recovered by the trustee on the ground of fraudulent preference.—*E. p. Ball; in re Hutchinson*, 35 W.R. 264.
- (iv.) **Q. B. D.**—*Interpleader Order—Stay of Execution—Bankruptcy Act, 1883, s. 4, sub-s. 1 (9).*—Where goods taken in execution under a judgment are claimed by a third party, and an interpleader order is made under which the sheriff withdraws from possession, the judgment creditor cannot issue a bankruptcy notice.—*E. p. Ford; in re Ford*, L.R. 18 Q.B.D. 369; 56 L.J. Q.B. 188; 56 L.T. 166.
- (v.) **Q. B. D.**—*Notice by Liquidator of Company—Companies Act, 1862, ss. 95, 133—Bankruptcy Act, 1883, s. 4.*—The liquidator appointed in the voluntary winding-up of a company may serve a bankruptcy notice on a judgment debtor of the company. Such notice must strictly comply with the provisions of the Companies' Act, 1862, s. 95.—*Re Winterbotham; s. p. Winterbotham*, L.R. 18 Q.B.D. 446; 56 L.T. 168.
- (vi.) **Q. B. D.**—*Petition—Computation of Time—Bankruptcy Act, 1883, ss. 6, 411.*—In calculating time for the purposes of section 6, the day on which the petition is presented must be excluded.—*E. p. Forster; re Hanson*, 35 W.R. 456.
- (vii.) **Q. B. D.**—*Preferential Claim—Wages—Piece-Work—Bankruptcy Act, 1883, s. 40.*—The foreman in a brickyard, who has engaged to make bricks at a specified rate, paying his own assistants, is a "workman," and entitled to priority of payment.—*E. p. Holyoak; re Field*, 35 W.R. 390.
- (viii.) **Q. B. D.**—*Preferential Claim—Apprenticeship Premium—Application for Return—Bankruptcy Act, 1883, s. 41, sub-s. 1.*—An application for return of an apprenticeship premium ought to be made to the registrar, and not to the Judge in Court.—*E. p. Gould; re Richardson*, 35 W.R. 381.

- (i.) **Q. B. D.**—*Proof—Joint and Several Contract—Partners—Bankruptcy Act, 1883, sched. 2, r. 18.*—Where partners have entered into a joint and several covenant to pay a sum of money, the creditor may prove in bankruptcy against both the joint and separate estate; and it is immaterial whether the money was advanced for partnership purposes or not. — *Re Laine and Longman*; *e. p. Berner and Neilson*, 56 L.J. Q.B. 153; 56 L.T. 170.
- (ii.) **Q. B. D.**—*Receiving Order—Application to Rescind—Discretion—Bankruptcy Act, 1883, s. 104.*—A receiving order having been made on the petition of the debtor, the Court has direction to refuse to rescind it on the application of the debtor, made before the conclusion of his public examination, though with the consent of the creditors.—*E. p. Leslie*; *re Leslie*, 35 W.R. 395.
- (iii.) **Q. B. D.**—*Scheme of Arrangement—Trustee—Removal—Accounts.*—The Board of Trade may require a trustee, under a scheme of arrangement, even after removal, to forward an account of receipts and payments.—*E. p. Board of Trade*; *re Rogers*, 35 W.R. 457.
- (iv.) **Q. B. D.**—*Transfer of Proceedings—Parties to be Served.*—On an application for transfer of proceedings notice should be served on the bankrupt and the official receiver, though a trustee has been appointed. *Re Yapp*; *e. p. The Trustee*, 53 L.T. 820.
- (v.) **Q. B. D.**—*Trustee—Affidavit of no Receipts.*—When the trustee has received no moneys on account of the debtor's estate, he must, at his own expense, provide the stamp for the affidavit of no receipts or payments to be forwarded to the Board of Trade.—*E. p. Board of Trade*; *re Rowlands*, 35 W.R. 457.
- (vi.) **Q. B. D.**—*Voluntary Settlement—Estate of Person Dying Insolvent—Bankruptcy Act, 1883, ss. 47, 125.*—Where the estate of a person dying insolvent is administered in Bankruptcy, the provisions of the Bankruptcy Act as to avoidance of voluntary settlements do not apply.—*E. p. Official Receiver*; *re Gould*, 35 W.R. 458.
See Company, p. 60, iii. *Practice*, p. 75, vi.

Bill of Sale:—

- (vii.) **C. A.**—*Rate of Interest—Time for Payment—Power of Sale—Expenses of Grantee—Bills of Sale Act (1878), Amendment Act, 1882.*—A bill of sale is not made void by provisions that interest should be paid at a certain rate "per month," that all the instalments should become due in default in paying one, that the grantee might sell after the expiration of five clear days from seizure, and that he should be entitled to the expenses of defending his rights.—*Lumley v. Simmons*, 56 L.T. 134; 35 W.R. 422.
- (viii.) **Q. B. D.**—*Statement of Consideration.*—A. had made to B. a *bond fide* advance of £220 on the security of a bill of sale, which, after the day of repayment, was found to be invalid. A new bill of sale was given "in consideration of £220 now paid to B. by A.;" no fresh advance being made. *Held*, that the consideration was truly stated, and the bill of sale valid.—*Re Hockaday*; *e. p. Nelson*, 55 L.T. 819; 35 W.R. 264.
- (ix.) **C. A.**—*Transaction Equivalent to Mortgage—Bills of Sale Act, 1882, s. 9—Railways Clauses Act, 1845, s. 97—Tolls.*—Decision of Ch. D. (*see* Vol. 11, p. 74, viii.) reversed.—*North Central Wagon Co. v. M. S. & L. R.*, 35 W.R. 443 & 447.

- (i.) **C. A.**—*Validity—Covenant for Maintenance of Security—Benefit to Grantee.*—A covenant to replace and repair articles destroyed, injured, or deteriorated, is "necessary for maintaining the security." A provision that the grantee may retain, out of the proceeds of sale, his commission as auctioneer, makes a bill of sale void. Decision of Q. B. D. (see Vol. 12, p. 4, ii.) affirmed for reasons other than those given in the Court below.—*Furber v. Cobb*, L.R. 18 Q.B.D. 494; 35 W.R. 398.
- (ii.) **C. A.**—*Validity—Power of Sale—Mortgage Debt Payable in One Sum—Statutory Form.*—A bill of sale, by which the mortgage debt is made payable in one sum, with interest, a month after the date of the deed, is valid, and the grantee may seize the chattels comprised in the security and sell them after the expiration of five days, the interest being in arrear more than two months.—*Watkins v. Evans*, L.R. 18 Q.B.D. 386; 56 L.J. Q.B. 200; 56 L.T. 177; 35 W.R. 313.
- (iii.) **C. A.**—*Validity—Power of Sale—Exclusion of Conveyancing Act, 1881, s. 20—Power to Break Doors and Windows—Bills of Sale Act, 1882.*—A mortgagee of chattels of which he has taken possession has, without express provision in the mortgage deed, power to sell the chattels after reasonable notice, and in default of payment. A bill of sale subject to the Act of 1882, which contains provisions relating to seizure of the goods, which are not expressly prohibited by the Act, though in part void under general law, is not thereby made void. A bill of sale is not made void by a provision that section 20 of the Conveyancing Act, 1881, shall not apply, or by a power to seize the goods, and for that purpose to break open the doors and windows of the premises where they may be.—*E. p. Official Receiver; re Morritt*, L.R. 18 Q.B.D. 222; 56 L.J. Q.B. 139; 56 L.T. 42; 35 W.R. 277.
- (iv.) **C. A.**—*Validity—Covenant for Further Assurance.*—Decision of Q. B. D. (see Vol. 12, p. 4, i.) affirmed.—*E. p. Rawlings; re Cleaver*, L.R. 18 Q.B.D. 489; 56 L.J. Q.B. 197; 35 W.R. 281.

Building Society:—

- (v.) **Ch. D.**—*Advanced Member—Liability for Losses—Arbitration.*—Where the rules of a building society contain no provision for losses an advanced member who has given the society a mortgage and has repaid all his advance is entitled to have his title deeds returned, and a receipt endorsed on the mortgage, without sharing in losses incurred since the advance, the society being solvent. The question is one which does not come within the arbitration clause.—*Buckle v. Lordonny*, 56 L.T. 273; 35 W.R. 360.

Burial Fees:—

- (vi.) **Ch. D.**—*New Burial Ground—Rights of Incumbent—Jurisdiction—Metropolitan Burials Act, 1852, ss. 32, 52.*—The Court has jurisdiction to decide a question as to fees between an incumbent and a burial board. Where an incumbent cannot shew that he has received burial fees within section 32 of the Metropolitan Burials Act, 1852, he cannot charge fees for burials in the consecrated part of a new burial ground, but if the burial board charge any fees they must pay them to him.—*Stewart v. West Derby Burial Board*, L.R. 34 Ch. D. 314; 35 W.R. 268.

Charity:—

- (vii.) **Ch. D.**—*Charitable Bequest—Scheme.*—The property of a religious unincorporated society was under the absolute control of the general superintendent. A testator bequeathed legacies to A (the general superintendent) "for the spread of the gospel." Held that the legacies should be paid to A. without a scheme.—*Re Lea; Lea v. Cooke* L.R. 34 Ch. D. 528.

- (i.) **Ch. D.**—*General Charitable Intent—Cy-près.*—A settlor granted a rent-charge to trustees to keep up the services at a private chapel, to educate children on the settlor's estate, and to maintain poor labourers dwelling in an almshouse on the estate: *Held*, that no general charitable intention could be imputed to the settlor, and that no scheme could be sanctioned by the Court.—*Hoare v. Hoare*, 56 L.T. 147.

Colonial Law :—

- (ii.) **P.C.**—*Canada—Public Highway—23 Vict., c. 72, s. 10, sub.s. 6.*—By Canadian law, where a road becomes a public highway, the soil is vested in the Crown or other public trustee. When a road in Montreal had been registered as a public place, and had been enjoyed by the public as a public highway more than ten years before registration, and more than ten years after registration, and before suit; *held*, that the road had become a public highway, and a private right to resume possession could not be established.—*De la Chevrotiere v. City of Montreal*, L.R. 12 App. Cas. 149; 56 L.T. 3.
- (iii.) **P.C.**—*Canada—Quasi Contract—Civil Code Act, 1041—Commencement de Preuve.*—Where an owner of land has empowered an agent to sell, and the agent has without a completed contract allowed an intending purchaser to take possession and effect improvements in the reasonable expectation of obtaining a transfer at a proper price, and then to transfer to a third party, who also effected improvements; *held*, that the owner is under a quasi contract to confirm the title of the transferees on payment of a price according to the rate ruling at the time of commencing the improvements, with interest from that date. "Commencement de preuve" must be some written evidence which lends probability to that which is sought to be proved by oral evidence.—*Price v. Neault*, L.R. 12 App. Cas. 110.
- (iv.) **P.C.**—*Natal.—Mora—Unreasonable Delay.*—Where a contract for sale of shares did not fix the time for delivery; *held*, that the time for delivery could not depend on circumstances unknown to the buyer, and that delay in tendering arising from the seller having sent his certificate to England for division, this circumstance being unknown to the buyer, was unreasonable, and justified the buyer in refusing acceptance. Such delay is *mora*, assuming the law of *mora* to be applicable.—*De Waal v. Adler*, L.R. 12 App. Cas. 141.
- See Executor*, p. 63, vi.
- (v.) **P.C.**—*Queensland Constitution Act, 1867, s. 23—Legislative Council—Non-attendance of Member.*—A member of the Queensland Legislative Council who has been absent for three whole successive sessions, having leave of absence for a period covering the whole of the first and a portion of the second session, vacates his seat by such absence.—*Attorney-General for Queensland v. Gibbon*, 56 L.T. 239.

Company :—

- (vi.) **Ch. D.**—*Action by Debenture-holder—Receiver and Manager.*—A receiver and manager of a company having been appointed, in an action by a debenture-holder to enforce the security, and having been afterwards appointed voluntary liquidator of the company; *held*, on motion for judgment, that a direction should be inserted in the minutes, that the receiver and manager should not carry on the business of the company for more than six months without leave of the Judge in Chambers.—*Day v. Sykes Walker & Co.*, 55 L.T. 763.

- (i.) **Ch. D.—Companies Act, 1867, s. 25—Paid-up Shares—Rectification of Register.**—The members of a firm sold their assets to a company formed for the purpose under a verbal contract. All the shares were issued as paid-up to the extent of the purchase money to the partners or their nominees. After the lapse of fourteen years the Court, being satisfied that all debts were provided for, rectified the register by striking out the names of all the shareholders; and directing the issue of new shares after a proper agreement had been executed and filed.—*Re Darlington Forge Co.*, L.R. 34 Ch. D. 522.
- (ii.) **Ch. D.—Debentures—Sale of Whole Assets.**—A sale of the whole of the assets of a company is subject to the rights of debenture holders to have a receiver appointed, and they are entitled in an action against the purchaser to have him restrained until trial from parting with the property of the company, otherwise than in the course of business of the company. *Semble*, that the right of debenture holders who have a charge on the undertaking of a company to apply to the Court to realize their security, arises when the company ceases to be a going concern.—*Hubbuck v. Helms*, 56 L.T. 232.
- (iii.) **Ch. D.—Remuneration of Directors—Articles of Association—Repayment.**—Directors were ordered to repay a sum of money which they had divided amongst themselves out of the funds of the company, in breach of the articles of association, which provided that the directors should receive no remuneration till a certain dividend had been paid; it being stated, but not proved by vouchers, that such sum was in repayment of expenses incurred by the directors on behalf of the company.—*Re Whitehall Court, Limited*, 56 L.T. 280.
- (iv.) **Ch. D.—Distribution of Assets—Partly Paid-up Shares.**—Subscribers to an issue of additional shares in a company who had the option of paying up in full and taking stock or of paying up part of their shares and remaining liable for the rest as and when it might be required by the company, and have exercised their option by paying part only, cannot, when the assets of the company come to be distributed, claim to pay up the remainder, but must share with the holders of stock in proportion to the amounts paid up by them respectively.—*Shephard v. Scinde, Punjab, and Delhi Ry.*, 56 L.T. 180.
- (v.) **Ch. D.—Prospectus—Misrepresentations—Repudiation.**—A shareholder who desires to repudiate his shares on the ground of misrepresentations in the prospectus, need not show that those misrepresentations were the sole inducement to take shares. A shareholder who, before the presentation of a winding-up petition, takes proceedings to be removed from the register, does not lose his right, owing to the fact that without his knowledge there were numerous unsatisfied judgment creditors of the company, and that its acceptances had been dishonoured.—*Carling v. London and Leeds Bank*, 56 L.T. 115; 35 W.R. 344.
- (vi.) **Ch. D.—Restoring to Register—Companies Act, 1880, s. 7, sub-s. 5.**—The Court may restore to the register the name of a company which has been struck out by the registrar, though the company is carrying on business only for the purposes of a voluntary winding-up.—*Re Outlay Assurance Society*, L.R. 34 Ch. D. 479; 35 W.R. 343.
- (vii.) **C. A.—Winding-up—Distress—"Estate or Effects"—Companies Act, 1862, s. 163.**—Where debenture holders have a charge on the property of a company for a sum exceeding the full value of such property, the "estate or effects" on the company's premises are the property of the debenture holders, and therefore the landlord may distrain for rent notwithstanding a winding-up order.—*Re New City Constitutional Club*; s.p. *Purcell* 35 W.B. 421.

- (i.) **Ch. D.**—*Winding-up—Disposition of Property pending Petition—Companies Act, 1862, s. 153.*—In an action by Debenture-holders to enforce their security, and a winding petition being pending, the Court authorised the acquisition of certain leases to be handed over to the trustees for the debenture-holders, being satisfied that the transaction was for the benefit of all parties.—*Carden v. Albert Palace Association*, 56 L.J. Ch. 166; 55 L.T. 831.
- (ii.) **C. A.**—*Winding-up—Mutual Dealings—Detinue—Bankruptcy Act, 1883, ss. 37, 38—Judicature Act, 1875, s. 10—Companies Act, 1862, s. 158.*—The right to set off claims arising from mutual dealings only applies when the claims on each side result in pecuniary liabilities; hence, when the liquidator of a company claims the return of goods and has in an action of detinue had their value assessed, the defendants in the action cannot set off a debt due to them from the company.—*Eberle's Hotels Company v. Jonas*, L.R. 18 Q.B.D. 459.
- (iii.) **Ch. D.**—*Winding-up Petition—Dismissal—Costs.*—When a petitioner elects to withdraw a winding-up petition and to have it dismissed with costs, shareholders and creditors, whether appearing to support or oppose the petition, are entitled to separate sets of costs.—*Re North Brazilian Sugar Factories Co.*, 56 L.T. 229.
- (iv.) **Ch. D.**—*Winding-up—Poor Rates—Companies Act, 1862, s. 85.*—The Court can, after a winding-up petition has been presented, restrain by injunction proceedings to enforce poor rates owing by a company.—*Re the Flint Coal and Cannel Co.*, 56 L.J. Ch. 232; 56 L.T. 16.
- (v.) **C. A.**—*Winding-up—Service out of Jurisdiction.*—The Court may give leave to serve notices of an appointment to settle the list of contributories of a company in liquidation on persons residing out of the jurisdiction who are alleged to be contributories.—*Re Nathan Newman & Co.*, 56 L.T. 95; 35 W.R. 293.
See Bankruptcy, p. 55, v.

Contract:—

- (vi.) **C. A.**—*Agreement in Consideration of Marriage—Memorandum in Writing—Statute of Frauds.*—Decision of Ch. D. (*see* Vol. 12, p. 6, iii.) affirmed).—*Vincent v. Vincent*, 56 L.T. 243.
- (vii.) **Ch. D.**—*Farming Agreement—Breach of Stipulation.*—The Court will not interfere by injunction to prevent the threatened breach of a stipulation in a farming agreement that the tenant should keep the farm properly stocked.—*Phipps v. Jackson*, 35 W.R. 378.
- (viii.) **C. A.**—*Misrepresentation—Rescission—Consequential Relief.*—A person who has been induced to join in a partnership business by material misrepresentations, though not made with fraudulent intent, is entitled to have the partnership dissolved, to repayment of the capital which he has brought into the business, and to an indemnity against all claims and demands arising out of the partnership.—*Newbigging v. Adam*, 56 L.J. Ch. 275; 55 L.T. 794.
- (ix.) **Ch. D.**—*Specific Performance—Rectification—Parol Evidence.*—Where the Statute of Frauds is not pleaded, and does not, by reason of part performance, apply, a plaintiff may have a contract rectified on parol evidence of mistake, and also have judgment for specific performance of the contract as rectified.—*Olley v. Fisher*, L.R. 34 Ch. D. 367; 56 L.J. Ch. 208; 55 L.T. 807; 35 W.R. 301.

Conversion:—

- (i.) **Ch. D.—Discretionary Power of Sale—Settlement—Sale during Existence of Contingent Interest.**—A lady being entitled, under a will, to real estate vested in trustees, who had a discretionary power of sale, settled the same on her marriage, the trustees of the settlement being the same as the trustees of the will and the same power of sale being conferred on them; *held*, that the settlement did not effect a conversion. The real estate being sold by the trustees during the existence of a contingent interest under the settlement, which never became vested, *held* to have been converted.—*Re Sinclair's Settlement*; *Crump v. Leicester*, 56 L.T. 83.

Copyhold:—

- (ii.) **Ch. D.—Legal Estate—Succession—Fines.**—The tenant on the rolls of a manor had surrendered to such uses as the trustees of a certain settlement should appoint; the trustees being unaware of the surrender, "granted, bargained, and sold" the copyholds to the person who had become absolutely entitled; *held*, that the legal estate did not pass to such person, and that the lord could not claim a fine. Where the tenant on the rolls being a trustee becomes beneficially entitled as heir-at-law to his *cestui que trust*, he does not take a new estate, and cannot be called on to pay a fine.—*Hail v. Bromley*, 55 L.T. 845.

Costs:—

- (iii.) **C. A.—Palatine Court—Refreshers—Copies and Translations of French Correspondence.**—The amount of refreshers allowed to counsel in the Palatine Court is in the discretion of the taxing-master. Where a case depended very much on the terms of correspondence conducted in French, the Court of Appeal refused to overrule the discretion of the taxing-master and the Judge, allowing the costs of copies of the original correspondence, as well as of the translation.—*Ebrard v. Gassier*, 55 L.T. 741.

See Company, p. 60, iii. *Mortgage*, p. 68, iv. *Practice*, p. 72, vi.; p. 73, viii. *Trustee*, p. 82, vi.

Criminal Law:—

- (iv.) **C. C. R.—Attempt at Rape—Rebutting Evidence.**—In a trial for attempted rape, evidence may be adduced to contradict the prosecutrix, who swore that she had not had previous voluntary connection with the prisoner.—*Reg. v. Riley*, L.R. 18 Q.B.D. 481; 35 W.R. 382.
- (v.) **C. A.—Committal to Prison—Unqualified Person acting as Solicitor—Criminal Prisoner.**—Decision of Q. B. D. (*see Vol. 12*, p. 6, vi.) reversed.—*Osborne v. Milman*, L.R. 18 Q.B.D. 471; 35 W.R. 397.
- (vi.) **Q. B. D.—Cruelty to Animals—Spaying Sows.**—Cruelty to animals, to come within the Criminal Law, must be shown to be an act inflicting pain for no legal, useful, or justifiable purpose to the knowledge or in the belief of the person inflicting it. Spaying sows is not a criminal act.—*Lewis v. Fermor*, L.R. 18 Q.B.D. 532; 56 L.T. 236; 35 W.R. 378.
- (vii.) **C. C. R.—Evidence—Misreception.**—If any evidence not legally admissible is left to the jury a conviction of the prisoner is bad, although there was other evidence before them, properly admitted, and sufficient for a conviction.—*Reg. v. Gibson*, L.R. 18 Q.B.D. 537; 35 W.R. 411.

- (i.) **Q. B. D.**—*Lunatic—Ill-treatment—Parent*—16 & 17 Vict., c. 96, s. 9.—The parents of a lunatic who resides with them under their care are persons "having the care or charge" of a lunatic, and may be convicted for ill-treating such lunatic.—*Buchanan v. Hardy*, L.R. 18 Q.B.D. 486; 35 W.R. 453.
- (ii.) **C. C. R.**—*Perjury—Sufficiency of Indictment—Evidence true as to one Occasion attributed to another Occasion*.—An inspector of nuisances being indicted for perjury in swearing that he had duly examined certain rabbits which were seized as unfit for food, it was proved that no such inspection was made at the time of seizure, but that it was made at a subsequent time; held, that the indictment which did not allege that the statements were made with reference to the time of seizure was insufficient.—*Reg. v. Hadfield*, 55 L.T. 783.
- (iii.) **C. A. & Q. B. D.**—*Property obtained by False Pretences—Restitution of Proceeds—Appeal—Larceny Act, 1861, s. 100.*—The Court may order the restitution to the owner of property which has been obtained by false pretences of the proceeds of sale of such property if they are in the hands of the person convicted of false pretences or his agent. Such an order is an order made in a criminal matter, and is not subject to appeal.—*Reg. v. Justices of Central Criminal Court; Foisard's Case*, L.R. 18 Q.B.D. 314; 56 L.J. M.C. 25; 35 W.R. 243.
- (iv.) **C. A.**—*Restitution of Goods obtained by False Pretences—Sale in Market overt—Larceny Act, 1861, s. 100.*—A bona fide purchaser in market overt of property which has been obtained by false pretences is, on the conviction of the fraudulent person, if the property is then in his hands, liable to restore it to the true owner.—*Vilmont v. Bentley*, L.R. 18 Q.B.D. 322; 56 L.J. Q.B. 128; 35 W.R. 238.
- (v.) **Q. B. D.**—*Rogue and Vagabond—Fortune Telling—5 Geo. IV., c. 83, s. 4—Evidence.*—A person, who advertised that he would cast nativities, give advice, and answer astrological questions, was applied to by a detective, and sent a circular stating that on receipt of a fee he would tell the fortune of any applicant; he did not actually tell the detective's fortune, and there was no evidence as to his belief or non-belief in his profession; held, that there was evidence to justify his conviction as a rogue and vagabond.—*Penny v. Hanson*, L.R. 18 Q.B.D. 478; 56 L.T. 235; 35 W.R. 379.

Damages:—

- (vi.) **C. A.**—*Measure of.*—The owner of a building estate being entitled to damages for injury caused by a flood for which the defendants are responsible, is entitled, as regards houses in possession, to recover the expenses of putting them in repair with an allowance for delay in letting; as regards houses let on building agreements on which he has advanced money, he is entitled to so much of the expenses of repairs as is necessary to make good his security; as regards land unlet, he is entitled to damages for delay in letting. He is not entitled to any damages for depreciation of his property owing to prejudice caused by the fear of another flood; nor to any damages in respect of diminution in the selling value of the ground rents of property let on lease.—*Rust v. Victoria Graving Dock Co.*, 56 L.T. 216.

Election (Municipal):—

- (vii.) **Q. B. D.**—*Return of Expenses—Inadvertence—Municipal Elections (Corrupt and Illegal Practices) Act, 1884, ss. 20, 21, sub-s. 3, sched. 4.*—A candidate at a municipal election, even though he has incurred no expenses, must make the required declaration within 28 days after the

election. Where the declaration has been omitted through inadvertence, and not want of good faith, the Court will extend the time to enable him to make the declaration.—*E. p. Robson; re Saffron Walden Election*, L.R. 18 Q.B.D. 336; 55 L.T. 813; 35 W.R. 290.

Endowed School:—

- (i.) **P. C.**—*Endowed Schools Acts, 1869, 1873, 1874—Removal of School—Vested Interests.*—The Charity Commissioners have power under the Acts to change the site of a school. A yearly payment made to a school by trustees under a scheme in Chancery, which provides for the cesser of the payment if the school is not in an efficient state is an "educational endowment," and will not be disturbed by the removal of the school. A school conducted under a scheme which contains a "conscience clause" is not a denominational school. A scheme which augments the endowments of the parish schools and provides exhibitions to be held at a grammar school by boys educated at the elementary schools of certain parishes pays due regard to the educational interests of the poor of those parishes. The parents of boys who have only been at an endowed school since the Act of 1869 have no *locus standi* to oppose a scheme affecting such school.—*Re Hemsworth Free Grammar School*, 56 L.T. 212; 35 W.R. 418.

Evidence:—

- (ii.) **C. C. R.**—*Hearsay—Rumour.*—Evidence of A that B had told him that C had committed an offence is not admissible as evidence of B's knowledge of the offence. Evidence of the existence of a rumour is no evidence of the knowledge of an individual, and is not within any of the exceptions to the rule against hearsay evidence.—*Reg. v. Gunnell*, 55 L.T. 786.
- (iii.) **Ch. D.**—*Pedigree—Declaration—Incomplete Document.*—In a pedigree case a document containing a relevant declaration by a deceased person is admissible in evidence, though incomplete for its primary purpose; e.g., a draft of his will in the handwriting of the declarant, though never executed.—*Re Lambert*, 56 L.J. Ch. 122; 56 L.T. 15.

Execution:—

- (iv.) **Ch. D.**—*Pawnbroker—Redeemable Pledges.*—A pawnbroker's interest in redeemable pledges may be taken in execution under a *fi. fa.*—*Rollason v. Rollason; Halse's Claim*, L.R. 34 Ch. D. 495.

Executor:—

- (v.) **Ch. D.**—*Admission of Assets—Mistake—Residuary Account—Declaration of Trust.*—An admission of assets is a question of evidence, and an executor may bring evidence to shew that his admission was made by mistake. But a statement in a residuary account that a legacy is "retained in trust" is a declaration of trust, and the executor is conclusively bound by it.—*Brewster v. Prior*, 53 L.T. 771; 35 W.R. 251.
- (vi.) **P. C.**—*Sale by Executor to himself—Suit by Legatee—Law of Natal.*—The sale by an executor to himself of the estate of a firm of which his testator was a partner, and also, as surviving partner in another firm, the sole creditor, is voidable by the rules of equity as recognised by the law of Natal; and at the suit of a residuary legatee a decree for administration of the testator's estate, and a declaration that the sale should be set aside will be made.—*Beningfield v. Baxter*, L.R. 12 App. Cas. 167; 56 L.T. 127.

Husband and Wife:—

- (i.) **P. D.—Divorce—Variation of Settlement.**—By post-nuptial settlement the husband settled property on trust for himself for life, or until forfeiture, with remainder to the wife for life, with further discretionary trusts for the benefit of the husband's next of kin, a second wife, or the issue of a second marriage. On the bankruptcy of the husband, by a compromise sanctioned by the Chancery Division, a portion of the fund was assigned to the trustee in bankruptcy, and his interest in the remainder to the trustees of the settlement. The marriage being dissolved by reason of the wife's adultery, the Court ordered that the income of five-twelfths of the fund should be paid to the wife, and that in other respects the trusts of the settlement should remain in force.—*Smith v. Smith*, L.R. 12 P.D. 102; 35 W.R. 459.
- (ii.) **P. D.—Divorce—Variation of Settlement—Evidence to Bastardise Issue—Practice.**—On a petition to vary a marriage settlement after a divorce on the ground of the wife's adultery, the Court refused to refer the report back to the registrar for the purpose of taking evidence to bastardise the only child of the wife, born five months after the decree nisi, but left the petitioner to his remedy by action in the Chancery Division.—*Pryor v. Pryor*, 35 W.R. 349.
- (iii.) **Ch. D.—Scotch Settlement—Construction.**—Where an Englishman on marriage with a Scotch lady makes a settlement in the Scotch form, the inference is that the document is intended to be construed according to the Scotch law, and therefore the claim of the wife to an annuity provided by the settlement, which by Scotch law entitles her to rank with creditors, takes precedence over the claims of children in the division of the assets.—*Re Barnard; Barnard v. White*, 56 L.T. 9.
- (iv.) **P. D.—Separation Order—Discharge—Appeal—Evidence of Wife's Adultery—Matrimonial Causes Act, 1878, s. 4.**—An application to discharge or vary a separation order on the ground of the wife's adultery must be made to the Court by which the order was made. An appeal from such order, or from a refusal to vary it, lies to the Probate Division, though a case has been stated for the opinion of the Queen's Bench Division, and has not been determined. On an application to vary such an order on the ground of the wife's adultery, the direct evidence of the husband or the admissions of the wife must be received to prove the paternity of a child born more than nine months after the order. The presumption of non-access applies from the date of the order.—*Hetherington v. Hetherington*, L.R. 12 P.D. 112.

Infant:—

- (v.) **Ch. D.—Infants Settlement Act, 1855—Post Nuptial Settlement.**—A post nuptial settlement may be made under the Act after the wife, having been married under the age of seventeen, has attained that age, provided the settlement is really made upon the occasion and for the purposes of marriage.—*Re Phillips*, L.R. 34 Ch. D. 467; 56 L.T. 144; 35 W.R. 284.
- (vi.) **C. A.—Married Woman—Ward of Court—Reversionary Interest—Validity of Settlement.**—Decision of Ch. D. (see Vol. 12, p. 8, viii.) reversed.—*Buckmaster v. Buckmaster*, 35 W.R. 438.

Interpleader:—

- (vii.) **C. A.—Goods Taken in Execution—Title of Third Party.**—Decision of Q. B. D. (see Vol. 12, p. 9, iii.) affirmed.—*Richards v. Jenkins*, L.R. 18 Q.B.D. 451; 35 W.R. 355.

Landlord and Tenant:—

- (i.) **Q. B. D.**—*Distress—Agricultural Holdings Act, 1883, s. 44.*—The landlord may distrain for more than one year's rent provided he does not distrain for any rent, which by the terms of the tenancy, or by the ordinary course of his dealing with his tenant, has been due, or ought to have been paid, more than a year before the distress.—*E. p. Bull; re Bew, 35 W.R. 455.*

See Contract, p. 60, vii. Company, p. 59, vii.

Law of Jersey:—

- (ii.) **P. C.**—*Foreign Judgment—Debtor's Trustees—Interest on Judgment—Costs.*—A foreign judgment being only evidence of a debt, the holder of an English judgment cannot, when suing in Jersey to enforce it, join as co-defendants other persons, on the allegation that they hold property as trustees for the debtor. The Jersey Court ought not to alter the interest on the English judgment except from the date of the Jersey judgment; and ought not to allow the costs occasioned by joining the debtor's trustees.—*Hawksford v. Giffard, L.R. 12 App. Cas. 122; 56 L.T. 32.*

Licensing:—

- (iii.) **Q. B. D.**—*Sunday Closing—Licensing Act (35 & 36 Vict., c. 94), s. 49.*—A condition requiring licensed premises to be closed during the whole of Sunday cannot be inserted in a new license, unless the applicant for the license applies for the insertion.—*Reg. v. Justices of Kirkdale, L.R. 18 Q.B.D. 248; 56 L.J. M.C. 24.*

Limitation:—

- (iv.) **Ch. D.**—*Acknowledgment—Undated Cheque—Presentment Excused—Bills of Exchange Act, 1882, ss. 45, 73.*—The words, "I will send you your account as soon as possible," are not an acknowledgment of indebtedness. Where, an undated cheque having been given, to be dated and presented by the creditor on hearing from the debtor of his success in negotiating a loan, the debtor informs the creditor that he has put off the loan, presentment of the cheque is excused, and an action may be brought on it at once, and therefore time begins to run.—*Re Bethell; Bethell v. Bethell, L.R. 34 Ch. D. 561; 56 L.T. 92; 35 W.R. 330.*
- (v.) **Ch. D.**—*Administrator—Time when Statute begins to Run.*—Time begins to run against the administrator of a person entitled to a legacy from the death of the intestate.—*Re Bonsor & Smith's Contract, L.R. 34 Ch. D. 560n.*
- (vi.) **Q. B. D.**—*Occupation by Rector.*—The user, as a site for a parish school, of a piece of land which had been purchased by a previous rector of the parish out of his own moneys, does not cause the Statute of Limitations to run so as to defeat the title of the heir of the original purchaser; and a lease of the land granted by such heir twenty-one years after the building of the school is a valid lease.—*Gibson v. Wise, 35 W.R. 409.*
- (vii.) **C. A.**—*Real Property Limitation Act, 1874, s. 2—Possession—Rule in Shelley's Case.*—The provision for limitation of action by the person entitled to an estate in remainder or reversion in cases where the person entitled to a particular estate is not in possession when his interest determines, only applies to cases where the right to possession and the actual possession of the particular estate are separated, and not to cases

where the owner of the particular estate has assigned his interest. Where the clear intention of a testator is that the heir shall take an estate for life only, the rule in *Shelley's case* will not apply.—*Pedder v. Hunt*, L.R. 18 Q.B.D. 565; 56 L.J. Q.B. 212; 35 W.R. 371.

Lis pendens.—See Practice, p. 74, iv.

Local Government:—

- (i.) **Q. B.**—*Election to Local Board—Disqualification—Composition with Creditors—Time for filling casual Vacancy—Public Health Act, 1875, Sched. II., rr. 5, 56.*—A person who has assigned all his property to a trustee for the benefit of his creditors who should sign the deed, who thereby discharged him from their debts, no sum being mentioned as a composition to be paid, is not disqualified for election to a Local Board. The time for filling up a casual vacancy occurring by "failure duly to elect," runs from the day on which the retiring member goes out of office, not from the day when the election to fill his place is held.—*Reg. v. Cooban*, L.R. 18 Q.B.D. 269.
- (ii.) **Q. B. D.**—*Expenses of Paving—Dismissal of Summons—Fresh Apportionment—Public Health Act, 1875, ss. 150, 257.*—When a summons against a frontager for his share of expenses of paving a street has been dismissed on the ground that it included the expense of work which the frontager could not be called on to do, the Urban Authority may make a fresh apportionment and obtain a charge on the premises of the frontager for the amount properly due from him.—*Mayor of Manchester v. Hampson*, 35 W.R. 334.
- (iii.) **Q. B. D.**—*Power of Rural Sanitary Authority—Bill in Parliament—Solicitor.*—A Rural Sanitary Authority has not power to charge the rates with the expenses of promoting a Bill; and their solicitor cannot therefore recover against them his expenses of such promotion.—*Cleverton v. St. Germain's*, 56 L.J. Q.B. 83.
- (iv.) **Q. B. D.**—*Sewer Rate—Special Expenses—Balance of Past Debt—Public Health Act, 1875, ss. 229, 230.*—A rate made under the Public Health Act, 1875, for paying sewerage expenses incurred under the Public Health Act, 1872, is bad on the ground that it is retrospective, and that a balance carried forward from year to year does not fall within the definition of special expenses in the Act of 1875.—*Saul v. Wighton Sanitary Authority*, 35 W.R. 252.

Lunatic:—

- (v.) **C. A.**—*Payment of Debts—Benefit of Lunatic—Lunacy Regulation Act, 1862, s. 12—Lunacy Regulation Amendment Act, 1882—Criminal Lunatics Act, 1884, s. 10, sub-s. (3).*—The Court will refuse applications to sanction the disposition of a lunatic's property, if the effect of granting them would be to benefit the lunatic's creditors and not himself.—*Re Price*, 56 L.J. Ch. 292; 56 L.T. 77; 35 W.R. 340.
- (vi.) **C. A.**—*Trustee—One of several Mortgagees.*—Section 3 of the Trustee Act, 1850, applies not only to the case of a sole trustee or sole mortgagee, but also to the case of one of several trustees or mortgagees.—*Re Jones*, 56 L.J. Ch. 272.
See Trustee, p. 82, v.

Married Woman:—

- (vii.) **Ch. D.**—*Capacity to Sue—Guardian ad litem—Married Woman's Property Act, 1882, s. 1, sub-s. 2.*—The old practice in Chancery by which a married woman cannot be next friend or guardian ad litem for an infant, is not abrogated.—*Re Duke of Somerset; Thynne v. St. Maur*, L.R. 34 Ch. D. 465; 56 L.T. 145; 35 W.R. 273.

- (i.) **Ch. D.**—*Restraint on Anticipation—Difficulty of Dealing with Estate—Conveyancing Act, 1881, s. 39.*—A post nuptial settlement of real and personal property given by will to two married women for their separate use without power of anticipation, sanctioned by the Court notwithstanding the restraint on anticipation: *Semble*, a married woman can make a will of property given to her for her separate use, notwithstanding a restraint on anticipation.—*Re Currey; Gibson v. Way*, 56 L.T. 80; 35 W.R. 326.
- (ii.) **Ch. D.**—*Separate Use.*—The separate use created by the Married Woman's Property Act, 1870, s. 8, extends only to rents and profits which may come to a married woman so as to be personally enjoyed by her, and does not give her any enlarged dominion over the inheritance.—*Johnson v. Johnson*, 56 L.T. 163; 35 W.R. 329.

See Administration, p. 53, ii.

Master and Servant:—

- (iii.) **Q. B. D.**—*Appointment of Receiver by Court—Voluntary Liquidator—Notice of Discharge.*—The appointment by the Court of a receiver and manager of a company, or a resolution for voluntary liquidation and appointment of a liquidator, has the effect of a notice of discharge to the servants of the company.—*Reid v. Explosives Co.*, 56 L.J. Q.B. 68.

Metropolis Management:—

- (iv.) **H. L.**—*Sewers—Expenses of Construction—"Street"—Metropolis Management Act, 1862, ss. 53, 112.*—Decision of C. A. (see Vol. 11, p. 85, ii.) affirmed.—*St. John, Hampstead, Vestry v. Cotton*, L.R. 12 App. Cas. 1; 56 L.T. 1.

Mines:—

- (v.) **C. A.**—*Coal Mines Regulation Act, 1872, s. 46—Arbitration—Power of Arbitrator.*—When a complaint of an inspector of coal mines has been referred to arbitration the arbitrator can only determine whether the complaint is well founded, but cannot prescribe any particular remedy for the matter complained of.—*Re Secretary of State and Fletcher*, L.R. 18 Q.B.D. 339; 56 L.J. Q.B. 177; 35 W.R. 282.
- (vi.) **Q. B. D.**—*Conveyance of Gunpowder.*—The word "case" in the Metalliferous Mines Act, 1872, s. 23, sub-s. 2, means something solid and substantial, and a linen bag is not such a "case."—*Foster v. Diphwys Casson Slate Co.*, L.R. 18 Q.B.D. 428; 56 L.J. M.C. 21.
- (vii.) **C. A.**—*Mining Lease—Suit for Specific Performance—Royalties.*—In action for specific performance of a contract to take a mining lease, the defendants, if they are working the mines, will be ordered to pay a sum into Court in respect of royalties, without having the option of giving up possession, the amount being fixed with regard to the rate which the defendant alleged was payable.—*Lewis v. James*, 56 L.J. Ch. 163.

Mortgage:—

- (viii.) **Ch. D.**—*Assignment of After-Acquired Property—Divisible Contract.*—An assignment by way of mortgage of all moneys which the mortgagor might during the continuance of the security become entitled to under any settlement or will, and of all the property which he might during the continuance of the security become entitled to, is divisible, and as to moneys to which he should become entitled under any will is not void for uncertainty.—*Re Clarke; Coombe v. Carter*, 35 W.R. 388.
- (ix.) **H. L.**—*Company—Lien on Shares—Notice of Charge—Priority.*—Decision of C. A. (see Vol. 11, p. 13, vii.) reversed.—*Bradford Banking Co. v. Briggs*, L.R. 12 App. Cas. 29; 56 L.T. 62.

- (i) **Ch. D.—Deposit of Deeds—Authority to Raise Money—Solicitor.**—A client having executed a mortgage to his solicitor, under the belief that the document was an authority to raise money; *held*, that a deposit of the deeds by the solicitor to secure an advance, which he misappropriated, gave the lenders a good equitable mortgage.—*French v. Hope*, 56 L.T. 57.
- (ii) **Q. B. D.—Deposit of Title Deeds.**—A debtor to a bank promised to give, when required, a security over his reversionary interest in real estate. After the death of the tenant for life the title deeds came into hands of the manager of the bank, for the purpose of paying succession duty. The debtor consented verbally to his continuing to hold them as security, but no memorandum of deposit was made. *Held*, that the bank was not entitled to an equitable mortgage.—*Re Beetham*; *s.p. Broderick*, L.R. 18 Q.B.D. 380.
- (iii) **Ch. D.—Foreclosure—Successive Periods for Redemption.**—The fact that one of two puisne mortgagees does not in his pleading deny an allegation of priority contained in the pleading of the other puisne incumbrancer, cannot be taken as an admission of such priority, and the first mortgagee is entitled to have only one period for redemption. *Semble*, even where priorities are not in dispute only one period for redemption ought to be allowed.—*Tufnell v. Nicholls*, 56 L.T. 152.
- (iv) **Ch. D.—Foreclosure—Default of Defendants—Costs of Affidavits—Time for Redemption.**—Where in a foreclosure action the mortgagor made default of appearance, and the other defendants, puisne incumbrancers, made default in pleading, the costs of affidavits filed by the plaintiff were disallowed. Three months from the date of certificate was allowed for redemption.—*Jones v. Harris*, 55 L.T. 884.
- (v) **Ch. D.—Incomplete Gift—Possession of Deeds.**—A purchaser having obtained a loan of part of the purchase-money, and intending to make a gift of the property to the lender, handed the title deeds to him; the gift not having been completed, *held*, after the death of the purchaser, that the lender had an equitable mortgage for his advance.—*Re McMahon*; *McMahon v. McMahon*, 55 L.T. 763.
- (vi) **Ch. D.—Industrial Society—Mortgage by Member—"Other Moneys" due from Mortgagor.**—In a mortgage by a member of an industrial society to secure to the society an advance and other moneys due from the mortgagor, debts *ejusdem generis* with the advance are meant, and a mortgagee of the equity of redemption may redeem the mortgage without paying sums of money embezzled from the society by the mortgagor.—*Bailes v. Sunderland Equitable Industrial Society*, 55 L.T. 808.

Negotiable Instrument:—

- (vii) **C. A.—Foreign Bond—Conflict of Law—Custom of Merchants.**—A foreign bond which by the law of a foreign country is a negotiable instrument is not negotiable by the law of England so as to give a *bond fide* holder for value a good title against the owner of the instrument from whom it has been stolen, there being no evidence of a custom of merchants in this country to treat it as negotiable.—*Picker v. London and County Bank*, L.R. 18 Q.B.D. 515.

Partition:—

- (viii) **Ch. D.—Service of Notice dispensed with—Advertisements—Partition Act, 1876, ss. 3, 4, sub-s. 3.**—In a partition action where service of notice of judgment on one of the persons interested is dispensed with, advertisements must be issued. Where this was not done distribution of the

proceeds of sale was delayed for six months for advertisements to issue, and personal application to the judge was required before distribution. *Phillips v. Andrews*, 56 L.T. 108; 35 W.R. 266.

Partnership :—

- (i.) **P. C.**—*Dissolution—Accretion to Capital of Partners—Distribution of Surplus—Lien.*—Where, in their accounts, partners had treated their shares of profits as accretions to their respective capitals; held, that the profits of the year ending with the dissolution of the firm could not be so treated. The surplus assets should be distributed by paying each partner his claim in respect of capital standing to his credit at the dissolution. The residue or deficiency will be profit or loss, divisible in the agreed proportions. The application of surplus assets in payment of capital claims must be subject to the liability to contribute to make up a deficiency, and to the claim of any of the partners against the entire assets to answer it.—*Binney v. Mutrie*, L.R. 12 App. Cas. 160.
- (ii.) **Q. B. D.**—*Share of Profits—Bovill's Act.*—A loan at interest, on terms that, until repayment, the lender should receive half the profits of the borrower's business, that the borrower should not dispose of his stock-in-trade, or engage in any other business, and should render accounts of his business to the lender, is not protected by Bovill's Act, but constitutes the lender a partner.—*Frowde v. Williams*, 56 L.J. Q.B. 62.

Patent :—

- (iii.) **Ch. D.**—*Action to Restrain Threats of Legal Proceedings—Interlocutory Injunction.*—The granting of an interlocutory injunction in an action against a patentee to restrain him from threatening legal proceedings in respect of a manufacture, will depend on the balance of convenience; and the plaintiff need not, as a condition precedent to such injunction, shew that his manufacture is not an infringement.—*Walker v. Clarke*, 56 L.J. Ch. 239; 56 L.T. 111; 35 W.R. 245.
- (iv.) **C. A.**—*Amendment of Specification—Conditions of Leave.*—As a general rule a plaintiff, in an action for infringement, ought not to be allowed to apply for leave to amend his specification by way of disclaimer, except on condition that the amended specification shall not be receivable in evidence in the pending action; but such a condition is not to be invariably imposed, and, with reference to imposing it, the effect which the amendment would have on the issue of the action should be considered.—*Bray v. Gardner*, 35 W.R. 340.
- (v.) **Ch. D.**—*Infringement—Disclaimer—Terms on which Liberty will be given to apply for Leave to Disclaim.*—The plaintiffs in action for infringement obtained liberty to apply for leave to amend their specification by disclaimer, on terms that no proceedings should be taken till disclaimer, that if the disclaimer should be made the plaintiffs should pay all the defendants costs till disclaimer, except those before the comptroller as between party and party, that they should undertake forthwith to take proceedings to amend their specification and found their action on it as amended, and in default of such amendment to dismiss their action.—*Fusee Vesta Co. v. Bryant & May*, L.R. 34 Ch. D. 458; 56 L.J. Ch. 187; 56 L.T. 110; 35 W.R. 267 & 284.
- (vi.) **Ch. D.**—*Practice—Action for Infringement—Disclaimer—Threat of Proceedings—Patents, Designs, and Trade Marks' Act, 1883, s. 32.*—The plaintiffs in an action for infringement of a patent, having obtained a stay of proceedings pending an application to amend their specification by disclaimer, will be restrained, on motion made in the action by the defendants, from threatening the defendants' customers with legal proceedings.—*Fusee Vesta Co. v. Bryant & May* (No. 2), 56 L.T. 136.

- (i.) **Ch. D.**—*Petition for Revocation—Evidence*.—A petition for the revocation of a patent is equivalent to an action to try the validity of a patent, and must be tried on *virâ voce* evidence.—*Re Gaulard & Gibb's Patent*, L.R. 34 Ch. 396; 56 L.T. 284; 35 W.R. 301.
- (ii.) **P. C.**—*Prolongation—Accounts—Rule 9*.—Petition for prolongation dismissed on the ground that proper accounts had not been produced to show the remuneration of the patentee. A postponement to amend the accounts filed was refused, as rule 9 had not been complied with.—*Re Yates & Kellett's Patent*, L.R. 12 App. Cas. 147.

Policy of Assurance:—

- (iii.) **P. C.**—*Construction—Latent Ambiguity*.—In an action on a policy of fire insurance, if the evidence discloses a latent ambiguity in the policy, so that it becomes necessary to consider other documents, and to resort to parol evidence to solve the ambiguity, a question of fact is raised, which must be determined by the jury.—*Hordern v. Commercial Union Assurance Co.*, 56 L.T. 240.
- (iv.) **Ch. D.**—*Married Women's Property Act, 1870, s. 10—Wife and Children—Joint Tenancy*.—A policy effected by a man on his own life provided that his "wife and the children of their marriage" should be entitled to receive the policy moneys; held, that the wife and the children who survived their father were entitled as joint-tenants.—*Re Seyton; Seyton v. Satterthwaite*, L.R. 34 Ch. D. 511; 35 W.R. 373.
- (v.) **Ch. D.**—*Married Women's Property Acts, 1870, 1882—Person Non Compos Mentis—Trustees*.—A person who had effected an insurance on his life for the benefit of his wife and children, having become *non compos mentis*, and being unable to pay the premiums, the Court appointed two trustees of the policy to surrender it in exchange for a paid-up policy.—*Schultze v. Schultze*, 56 L.T. 231.

Poor Law:—

- (vi.) **C. A.**—*Rating—Land taken for Improvements—Deficiency in Assessment—Liability of Promoters—Lands Clauses Consolidation Act, 1845, s. 133—Separate Schemes*.—The liability of a sanitary authority, being the promoters of an undertaking, to make good the deficiency in the assessment to the poor-rate caused by their taking land, ceases when all the structural works have been completed, and when all the surplus land which can become assessable has become assessable. Where the authority to put in force the compulsory powers of the Lands Clauses Act is given by a provisional order confirmed by a statute which describes in one schedule, but under separate headings, the improvement schemes promoted by the sanitary authority, each such scheme is for the purpose of calculating the deficiency in the assessment, to be considered a separate undertaking.—*Governor of the Poor of Bristol v. Mayor of Bristol*, L.R. 18 Q.B.D. 549.
- (vii.) **Q. B. D.**—*Settlement—Widow*.—The word "wife" in the Divided Parishes Act, 1876, s. 35 does not include a widow.—*Guardians of Kingsbridge v. Guardians of East Stonehouse*, L.R. 18 Q.B.D. 523.
- (viii.) **Q. B. D.**—*Settlement—Derivative—Divided Parishes Act, 1876, ss. 34, 35*.—A legitimate child, going with his father to reside in a parish, other than that of his birth, in which second parish the father acquires a settlement while the child is under sixteen, derives such settlement from his father, and retains it until he acquires another, whatever may be his age at the time of enquiry.—*Guardians of St. Pancras v. Guardians of Norwich*, L.R. 18 Q.B.D. 521.

Practice:—

- (i.) **Ch. D.—Action commenced in Chancery Division—Damages—Jury—Discretion of Court—R.S.C., 1883, O. xxxvi., rr. 4, 6.**—The defendants in an action for infringement of a trade mark having submitted to an injunction, and the only question remaining being the amount of damages, the plaintiff is entitled to have the question tried by a jury. Even if the Court has discretion to refuse a trial by jury, it ought not do so.—*Fennessy v. Rabbits*, 56 L.T. 188.
- (ii.) **Ch. D.—Administration—Accounts and Inquiries—Absent Parties—Further Consideration—Affidavits—R.S.C., 1883, O. xvi.; xxxvii., r. 1.; lv., r. 33.**—Persons interested in an estate the subject of an administration action to which they have not been made parties, and whose rights may be affected by an order directing accounts and enquiries, are not bound by the proceedings under the order—at any rate where they ought to be served—unless they are served with notice of the order, or unless a member of their class has been appointed by order to represent them. The Court may receive fresh affidavit evidence on further consideration after the Chief Clerk's certificate has been made.—*May v. Newton*, L.R. 34 Ch. D. 347; 56 L.T. 140; 35 W.R. 363.
- (iii.) **Ch. D.—Administration—Costs of Executor—Probate Litigation.**—In a creditor's action for the administration of the estate of a testator, who left no personal estate, but only real estate insufficient to satisfy creditors, the estate is to be applied in paying: (1) the executor's costs of the administration action as between solicitor and client; (2) the plaintiff's costs as between solicitor and client; (3) the debts. The executor has no priority for his costs of a probate action in which the will was unsuccessfully disputed, the defendant in which was ordered, but failed, to pay the costs.—*Re Pearce; McLean v. Smith*, 56 L.T. 223; 35 W.R. 358.
- (iv.) **C. A.—Appeal—Security for Costs—R.S.C., 1883, O. lviii., r. 15.**—The rule that an order for security for costs of an appeal will not be made if the motion for security and the appeal are in the paper for the same day, is subject to exceptions under special circumstances; e.g., that the applicant had no opportunity of applying earlier, and that the appeal was in fact promoted by a person of means who was not a party on the record.—*Re Clough; Bradford Commercial Joint Stock Bank v. Cure*, 56 L.T. 104; 35 W.R. 353.
- (v.) **Q. B. D.—Appeal from County Court—Security for Costs—R.S.C., 1883, O. lviii., r. 15.**—The Court may, on an appeal from a County Court by a plaintiff, a minor, by his next friend, require security for costs from the next friend.—*Swain v. Follows*, 35 W.R. 408.
- (vi.) **C. A.—Appeal for Costs—Hostile Action Against Trustees—R.S.C., 1883, O. lxxv., r. 1.**—The costs of a hostile action for administration against a trustee, charging him with misconduct, do not come within the rule that the plaintiff is entitled to his costs out of the fund, but are in the discretion of the Judge.—*Williams v. Jones*, L.R. 34 Ch. D. 120; 56 L.T. 68.
- (vii.) **Ch. D.—Attachment—Personal Service—Waiver.**—A solicitor cannot be attached for disobeying an order to deliver a bill of costs, which order has not been served on him personally, but left with a clerk at his office. A letter written by him giving reasons for delay, and promising delivery of the bill, is not a waiver of personal service.—*Re Cunningham*, 55 L.T. 766.

- (i.) **Q. B. D.**—*Attachment of Debts—Assignment of Judgment Debt—Garnishee Order*—R.S.C., 1883, O. xlii., rr. 3, 32; O. xlv., r. 1.—The assignee of a judgment debt is a person who has obtained a judgment for the recovery of money, and is entitled to a garnishee order attaching debts due from the garnishees to the judgment debtor.—*Goodman v. Robinson*, L.R. 18 Q.B.D. 332; 55 L.T. 811; 35 W.R. 274.
- (ii.) **P. C.**—*Colonial Appeal—Concurrent Findings of Facts*.—Where there have been concurrent findings of fact by the Courts below, the question in appeal is not what conclusion the Privy Council would have arrived at if the case had for the first time come before them, but whether it has been established that the findings of the Courts below were clearly wrong.—*Allen v. Quebec Warehouse Co.*, L.R. 12 App. Cas. 101; 56 L.T. 30.
- (iii.) **P. C.**—*Colonial Appeals—Consolidation*.—The Privy Council will consolidate appeals at any stage if it appears convenient that they should be heard together. An appeal was struck out of the list and ordered to be consolidated with two other appeals arising out of the same will, but in a suit which had not been instituted till a year after the first appeal had been admitted.—*Hiddengh v. Denysse*, L.R. 12 App. Cas. 107.
- (iv.) **Q. B.**—*Consolidation of Actions—Libel* R.S.C., 1883, O. xlix., r. 8—*Stay of all Actions but one*.—Where the plaintiff had commenced numerous actions against newspapers for publication of the same libel the Court refused to consolidate the actions, as the publications and attendant circumstances being different the causes of action were different; but stayed proceedings in all the actions save one, to be selected by the plaintiff, pending the trial of the selected action, the plaintiff to be at liberty to select and try a second action if dissatisfied with the verdict in the first, and the defendants undertaking to be bound by the verdict in the selected actions.—*Colledge v. Pike*, 56 L.T. 124.
- (v.) **Q. B. D.**—*Compromise of Probate Action—Agreement—Rule of Court*.—A suit for judicial separation brought by the wife having been compromised on a signed agreement for the execution of a separation deed, the husband to pay the wife's costs, and the agreement to be made a rule of Court, an *ex parte* order to make the agreement a rule of Court, on the husband refusing to pay the costs, was upheld.—*Smythe v. Smythe*, L.R. 18 Q.B.D. 544; 56 L.J. Q.B. 217; 56 L.T. 197; 35 W.R. 346.
- (vi.) **C. A.**—*Copies of Documents—Costs*.—When a case is heard by three judges three copies of all material documents should be provided, and the costs of them will be allowed on taxation.—*Re Randell; Hood v. Randell*, 56 L.T. 8.
- (vii.) **Ch. D.**—*Costs—Defaulting Trustee*.—In an action arising from a breach of trust the plaintiffs recovered assets bequeathed by the will of a deceased trustee who had committed a breach of trust. These assets being insufficient to pay in full the amount due to the plaintiffs and their costs; held, that a trustee of the will of the defaulting trustee was not entitled to his costs out of the fund.—*Re Knott; Bax v. Palmer*, 56 L.T. 161; 35 W.R. 302.
- (viii.) **Ch. D.**—*Costs—Shorthand Notes—Taxing Master*—R.S.C., 1883, O. lxx., r. 25.—A taxing master having power to cause witnesses to be examined before him has discretion to allow the costs of a shorthand note of their evidence.—*Re Hilleary & Taylor*, 56 L.T. 166; 35 W.R. 365.

- (i.) **Ch. D.**—*Costs—Sale by Court—Scale Fees—Solicitors Remuneration Act, 1881—General Order Clause 4, and Schedule 1, Part 1, r. 11.*—On a sale by the Court where the chief clerk had before the sale settled a sum for auctioneer's fees, the solicitor is not entitled to scale fees for conducting the sale by auction, though he had paid all the expenses of the auction, and the auctioneer had merely offered the property for sale.—*Re Sykes; Sykes v. Sykes*, 56 L.J. Ch. 238.
- (ii.) **C. A.**—*Discovery—Breach of Copyright, 3 & 4 Will. IV., c. 15, s. 2—5 & 6 Vict., c. 45, s. 20.*—An action for damages for breach of copyright in a musical composition is not an action for penalties, and discovery by way of interrogatories is allowable.—*Adams v. Batley*, 35 W.R. 437.
- (iii.) **Ch. D. & C. A.**—*Discovery—Inspection of Documents—"Personal exception" to Agent for Inspection—O. xxv., rr. 2, 4.*—An agent will not be ordered to produce for inspection books and documents relating to his agency if there is a reasonable "personal exception" to the person nominated by his principal to inspect them. An objection to the person so nominated as being a clerk to a person competing in trade with the agent, and engaged in litigation with him, is a reasonable "personal exception." In proceedings under O. xxv., rr. 2 & 4, the Court is not bound to regard the case with the same strictness as under the old practice on demurrer, but will now have more regard to the reasonableness or unreasonableness of the claim or defence.—*Dadswell v. Jacobs*, L.R. 34 Ch. D. 278; 56 L.J. Ch. 233; 55 L.T. 751 & 857; 35 W.R. 261.
- (iv.) **Q. B. D.**—*Election Petition—Change of Venue—"Special Circumstances"—Parliamentary Elections Act, 1868, s. 11, sub-s. 11.*—Where the allegations of fact in a parliamentary election petition are admitted so as to render it unnecessary at the trial to call witnesses from the district in which the election took place, the Court may order the petition to be tried in London.—*Arch v. Bentinck*, L.R. 18 Q.B.D. 548.
- (v.) **C. A.**—*Error in Judgment—Correction—R.S.C., 1883, O. xxviii., r. 11.*—The Court has jurisdiction to correct an error in a judgment arising from an accidental slip, although the time for appealing from the judgment has passed.—*Barker v. Purvis*, 56 L.T. 181.
- (vi.) **Ch. D.**—*Foreclosure—Writ—Enlargement of Claim—R.S.C., O. xx., r. 4.*—Where a defendant does not appear in an action for foreclosure, the plaintiff cannot enlarge the scope of his action by his statement of claim by asking for relief beyond that asked for by the writ.—*Law v. Philby*, 35 W.R. 450.
- (vii.) **C. A.**—*Interpleader—Order for Payment of Amount of Claim.—R.S.C., 1883, O. lvii., r. 5.*—Where on an interpleader summons the master has made an order for the sheriff to sell and pay to the claimant the amount of his claim, the claim is limited to that put forward before the master on the hearing of the summons.—*Hockey v. Evans*, L.R. 18 Q.B.D. 390; 56 L.T. 179; 35 W.R. 265.
- (viii.) **Q. B. D.**—*Interpleader—Appeal from Summary Decision of Master—R.S.C., 1883, O. liv., rr. 12, 21—O. lvii., rr. 8, 11—Costs of Stakeholder.*—An appeal lies from the summary decision of the master in an interpleader proceeding to a judge in chambers. A stakeholder interpleading, who acts in good faith, may, though not a defendant in an action, deduct from the fund in dispute the costs of the interpleader proceedings.—*Clench v. Dooley*, 56 L.T. 122.

- (i.) **C. A.**—*Judgment by Consent—Judge's Order—Debtors Act, 1869, s. 27.*—The effect of non-compliance with the requirements of section 27 of the Debtors Act is to render the order and judgment void as against creditors of the defendant but not as against himself, and the defendant cannot have the judgment set aside for such non-compliance.—*Gowan v. Wright*, L.R. 18 Q.B.D. 201; 56 L.J. Q.B. 131; 35 W.R. 297.
- (ii.) **C. A.**—*Leave to Appeal after Expiration of Time—Informal Notice—R.S.C., 1883, O. lviii., rr. 2, 3, 15.*—Where a party gave notice of appeal within the time for appealing, which notice was informal by reason of being a four days' instead of a fourteen days' notice; held, on an application, after the time for appealing had expired, for leave to amend the notice, that as notice of appeal had been given, a fresh notice might be served on paying all costs incurred by the respondent by reason of the informal notice.—*Re Crosley; Munns v. Burn*, 56 L.T. 103; 35 W.R. 294.
- (iii.) **Q. B. D.**—*Liverpool Court of Passage—Validity of Rule of Court—Security for Costs.*—A rule made by the assessor of the Liverpool Court of Passage, that in frivolous and vexatious actions the registrar should have power to order the plaintiff to give security for the defendant's costs, is *ultra vires* and void.—*Reg. v. Mayor of Liverpool*, L.R. 18 Q.B.D. 510.
- (iv.) **Ch. D.**—*Lis pendens—Administration Action—Real Estate Specifically devised.*—The registration as a *lis pendens* of an action for the administration of the real and personal estate of a deceased person, the pleadings containing no other mention of the real estate, is not sufficient to charge real estate specifically devised, so as to give the plaintiff priority over a mortgagee of the devise.—*Price v. Price*, 35 W.R. 386.
- (v.) **Q. B. D.**—*Mayor's Court—Removal of Action.*—An action brought in the Mayor's Court against a stockbroker charging him with misconduct in the purchase of shares, is fit to be tried in the Superior Courts, and the defendant is entitled to have it removed by writ of *certiorari*.—*Simpson v. Shaw*, 56 L.J. Q.B. 92; 56 L.T. 24.
- (vi.) **Q. B. & P. D.**—*Motion for New Trial—Misdirection—Notice of Motion R.S.C., 1883, O. xxxix., r. 3.*—The notice of motion for a new trial on the ground of misdirection should state how and in what matter the judge misdirected the jury.—*Pfeiffer v. Midland Ry. Co.*, L.R. 18 Q.B.D. 243; 35 W.R. 335; *Murfett v. Smith*, L.R. 12 P.D. 116; 35 W.R. 460.
- (vii.) **Ch. D.**—*Payment into Court—Interlocutory Application—Account.*—In an action by one co-owner of property against another co-owner who had sold the property, the defendant claimed credit for sums due to himself for remuneration and expenses. On an interlocutory application for payment into Court, the Court went in detail through the account, and ordered the defendant to pay in the balance which appeared due from him.—*Wanklyn v. Wilson*, 56 L.J. Ch. 209; 56 L.T. 52; 35 W.R. 332.
- (viii.) **Ch. D.**—*Payment Out—Lands Clauses Act, 1845—"Persons Absolutely Entitled"—Charity.*—A fund in Court, representing lands belonging to a charity, was paid out to the governors of the charity as "persons absolutely entitled," on their proving that they had spent, with the approval of the Charity Commissioners, an equal sum out of the income of the charity, in improving the charity estates.—*E. p. The Haberdashers' Co.*, 55 L.T. 758.
- (ix.) **Ch. D.**—*Pleading—Judgment as in Default of Defence—R.S.C., 1883, O. xxvii., r. 11.*—The plaintiff in an action for specific performance having claimed ancillary relief, but not a declaration of lien, cannot on a

motion for judgment as in default of defence, have a declaration of lien.—*Tacon v. National Standard Land Mortgage Co.*, 56 L.T. 165.

- (i.) **Ch. D.**—*Pleading—Foreclosure—Personal Order—Default.*—In a foreclosure action, where the mortgagor is in default in appearance and pleading, and the plaintiff on motion for judgment asks for a personal order for payment by the mortgagor, the statement of claim ought to contain an express statement of the covenant on which such order is claimed.—*Law v. Philby*, 56 L.T. 230; 35 W.R. 401.
- (ii.) **Ch. D.**—*Service out of Jurisdiction—Ex parte Order—Misstatements—R.S.C.*, 1883, O. xi., r. 4.—Where an *ex parte* order has been made for service of a writ out of the jurisdiction, but the affidavit on which the order was obtained contained misstatements of fact which shewed that the plaintiffs had *prima facie* an overwhelming good cause of action, the order will be discharged at the instance of the defendants, as the party making an *ex parte* application must observe *uberrima fides*.—*Republic of Peru v. Dreyfus Bros.*, 55 L.T. 802.
- (iii.) **Ch. D.**—*Specific Performance—Default of Pleading—Minutes—Notice of Motion—Evidences.*—In an action for specific performance, on a motion for judgment in default of pleading, where minutes of the proposed judgment have not been left with the judge's clerk, the plaintiff must state in his notice of motion the exact words of the judgment for which he asks. He need not file affidavits.—*De Jongh v. Newman*, 56 L.T. 180; 35 W.R. 403; *Bagley v. Searle*, 35 W.R. 404.
- (iv.) **C. A.**—*Stay of Execution Pending Appeal—O. lviii., rr. 16, 17.*—An application for a stay of execution pending an appeal to the House of Lords must be made to the Court of Appeal.—*Hamill v. Lilley*, 35 W.R. 437.
- (v.) **C. A.**—*Stay of Execution Pending Appeal—O. lviii., r. 16.*—A master at Chambers has power to stay execution pending an appeal to the Court of Appeal from a judgment at a trial without a jury.—*Oppert v. Beaumont*, L.R. 18 Q.B.D. 435; 56 L.J. Q.B. 216; 35 W.R. 266.
- (vi.) **Ch. D.**—*Staying Proceedings—Pending Application in Bankruptcy.*—The plaintiff in an action to enforce a mortgage of real property and a bill of sale of chattels, having by agreement postponed enforcing his securities on the execution by the mortgagor of a further bill of sale, and having, after the subsequent bankruptcy of the mortgagor, commenced a second action against the trustee in bankruptcy to enforce the securities, and having applied in bankruptcy for an order that the trustee should withdraw from possession of the chattels: *Held*, that the actions should not be stayed pending the application in bankruptcy, as questions would probably arise fitter for decision in the actions than in bankruptcy: *Held*, also, that the plaintiff's application in bankruptcy relating only to the chattels did not deprive him of his right to proceed with the actions, which related also to real estate.—*Sharp v. McHenry*; *Sharp v. Brown*, 55 L.T. 747.
- (vii.) **Q. B. D.**—*Special Indorsement—Form—O. iii., r. 6—Appendix A, No. 2—Appendix C, s. 4.*—In a statement of claim endorsed on a writ of summons the word "Delivered" and the date need not appear.—*Veale & Co. v. Automatic Boiler Feeder Co.*, 35 W.R. 454.
- (viii.) **Q. B. D.**—*Substituted Service of Writ—R.S.C.*, 1883, O. xi., rr. 1, 6; O. lxvii., r. 6.—There can be no substituted service of a writ where there cannot in law be personal service.—*Field v. Bennett*, 56 L.J. Q.B. 89.

- (i.) **C. A.—Third Party—Interrogatories—R.S.C., 1883, O. xxxi., r. 1.**—A third party who has obtained leave to appear at the trial and oppose the plaintiff's claim as far as he may be affected thereby, is an "opposite party," and may be interrogated by the plaintiff.—*Eden v. Weardale Iron Co.*, L.R. 34 Ch. D. 223; 56 L.J. Ch. 178; 55 L.T. 860; 35 W.R. 235.
- (ii.) **Ch. D.—Third Party—Interrogatories—R.S.C., 1883, O. xvi., rr. 52, 53; O. xxxi., r. 1.**—A third party who has obtained leave to appear and oppose the plaintiff, and to adduce evidence and cross-examine the plaintiff's witnesses, and whom the plaintiff has obtained leave to interrogate, cannot himself interrogate the plaintiff.—*Eden v. Weardale Iron and Coal Co.*, 56 L.T. 281; 35 W.R. 357.
- (iii.) **Ch. D.—Unpaid Costs—Stay of Proceedings.**—A trial will be postponed when the plaintiff is in contempt for non-compliance with an order to pay the costs of a previous action. The question may be raised by preliminary objection at the trial, as well as by summons.—*Re Wickham; Murony v. Taylor*, 56 L.T. 56.
- (iv.) **Ch. D.—Trial by Jury—R.S.C., 1883, O. xxxvi., rr. 2-8.**—The defendant in an action which could before the Judicature Act, 1873, have been tried by the Court of Chancery, cannot as of right demand a trial by jury. Where the suitor has no absolute right to a jury the Court has a discretion under rules 4 and 7a to order a trial with or without a jury.—*Coote v. Ingram*, 35 W.B. 390.
- (v.) **Ch. D.—Writ—Special Indorsement—Final Judgment—R.S.C., 1883, O. iii., r. 6; O. xiii., r. 3; O. xiv., r. 1.**—A plaintiff is not entitled to final judgment under Ord. 14, r. 1, when his writ claims other relief besides payment of a liquidated demand, as, *e.g.*, foreclosure. An indorsement on an amended writ asking for foreclosure or sale, and payment of the mortgage money with interest and costs is not a special indorsement under Ord. 13, r. 6.—*Imbert-Terry v. Carver*, L.R. 34 Ch. D. 506; 56 L.T. 91; 35 W.R. 328.
- See Partition*, p. 68, viii. *Patent*, p. 69, vi.

Principal and Agent:—

- (vi.) **C. A.—Debtor and Creditor—Interest.**—Decision of Ch. D. (*see* Vol. 12, p. 15, iv.) affirmed.—*Henderson v. Rothschild*, 56 L.T. 98.

Railway:—

- (vii.) **H. L.—Common Carriers—Reasonable Contract—Alternative Rates—Railway and Canal Traffic Act, 1854, s. 7.**—The question whether a contract of carriage is just and reasonable is for the Court, not for the jury. A condition made by a railway company is to be deemed unreasonable unless the contrary is established. A contract to carry at less than the ordinary rate on condition of relieving the company from liability for damage or delay unless caused by wilful misconduct of the company's servants, is just and reasonable. A condition that the company would undertake, for cattle carried at their ordinary rates, the liabilities of common carriers up to an amount of £15 per head, but would not admit liability for animals dying of disease or arriving in such a condition as to be able to walk from the truck, is just and reasonable.—*G. W. R. v. McCarthy*, 35 W.R. 429.
- (viii.) **C. A.—Undue Preference—Through Rates.**—An agreement between railway companies for through rates under sections 87 and 88 of the Railways Clauses Act, 1845, is not subject to the provisions of section 90, which requires an equality of tolls for similar services rendered to all persons.—*Hull, Barnsley & West Riding Ry. Co. v. Yorkshire & Derbyshire Coal Co.*, 35 W.R. 385.

Revenue:—

- (i.) **Q. B.**—*Income Tax*—"Vocation."—Persons deriving profits from betting carried on systematically throughout the year, are chargeable with income-tax thereon in respect of a "vocation" under Schedule D.—*Partridge v. Mallandaine*, L.R. 18 Q.B.D. 276; 56 L.T. 203; 35 W.R. 276.
- (ii.) **Q. B. D.**—*Income Tax*—*Foreigner Carrying on Trade in England*.—A foreign firm employing an agent in England to sell their goods and collect amounts due from customers, the agent being paid by commission, is assessable to income-tax in respect of a trade carried on in England.—*Pommery v. Apthorpe*, 56 L.J. Q.B. 155; 56 L.T. 25; 35 W.R. 307.
- (iii.) **Q. B. D.**—*Stamp Duties on Accounts*—*Voluntary Settlement*—*Life Interest Reserved*—*Customs and Inland Revenue Act, 1881, s. 38, sub.s. 2 (c)*.—A transfer of shares in a partnership, made to operate from the death of the transferor or from a given date with a condition, which was fulfilled, that the transferee should before that date execute a covenant to pay the transferor during his life interest on the value of the shares, and also annuities to other persons, is a voluntary settlement with a reservation of a life interest to the settlor, and stamp duty is, on his death, payable on the amount of the shares.—*Crossman v. Reg.*, L.R. 18 Q.B.D. 256; 55 L.T. 848; 35 W.R. 303.
- (iv.) **Q. B. D.**—*Stamp*—*Revocable Agreement to Grant Permission to Erect a Jetty*—*Stamp Act, 1870, ss. 70, 78, and Schedule*.—An instrument not under seal by which a party agrees to grant permission during his pleasure for erection of a jetty, in consideration of an annual payment to continue so long as the jetty is allowed to remain, is not chargeable with stamp duty either as a "conveyance on sale," or as an instrument whereby property is transferred or vested, or as a "lease" or "bond; covenant, or instrument of any kind whatsoever," but only as an "agreement."—*Conservators of the Thames v. Commissioners of Inland Revenue*, L.R. 18 Q.B.D. 279; 56 L.J. Q.B. 181; 56 L.T. 198; 35 W.R. 274.

Scotch Law:—

- (v.) **H. L.**—*Right in Security*—*Disposition ex facie absolute*—*Security for past and future Advances*—*Advances after Notice of Assignment*.—A disponee who holds property on an *ex facie* absolute title of ownership, but in security only for past and future advances to the disponent, cannot hold the property as security for advances made after notice that the disponent has conveyed his reversionary interest for valuable consideration.—*Union Bank of Scotland v. National Bank of Scotland*, L.R. 12 App. Cas. 53; 56 L.T. 208.

Setting Aside Deeds.—See Solicitor, p. 80, vii.

Settled Land:—

- (vi.) **Ch. D.**—*Improvements*—*Power to expend Income*—*Capital Moneys*—*Settled Land Act, 1882, ss. 21 (iii.), 22, 25, 26, 33, 56, & 58 (ix.)*.—The power of a tenant for life to require that capital moneys arising under the Act should be laid out in improvements is paramount to the powers of the trustees, notwithstanding an express power in the settlement, under which they might have executed the improvements and paid for them out of income; the position of the tenant for life is not affected by the fact that there are no trustees, and that the capital money is in Court.—*Clarke v. Thornton*, 56 L.J. Ch. 302.
- (vii.) **C. A.**—*Improvements*—*Expenditure by Tenant for Life*—*Settled Land Act, 1882, ss. 21, 25, 26*.—To obtain the sanction of the Court to expenditure of capital moneys on improvements, a scheme of the proposed improvements must be submitted to the trustees, and the sanction of the Court

to the payment of the capital moneys must be obtained before the works are commenced. *Quære*, whether the Court can sanction payments for improvements on an estate which is no longer subject to the settlement.—*Re Hotchkin's Settled Estate*, 56 L.T. 244.

- (i.) **Ch. D.**—*Settled Land Act, 1882, s. 21, s. 22; sub-ss. 1, 2, 3, s. 40—Payment of Purchase Money into Court—Application.*—Where on a sale by the tenant for life he has acquiesced in the purchaser's demand that the purchase money should be paid into Court, he cannot have it paid out to the trustees of the settlement, but it must be applied by the Court.—*Cookes v. Cookes*, L.R. 34 Ch.D. 498; 56 L.T. 159; 35 W.R. 402.

Settlement:—

- (ii.) **Ch. D.**—*Construction—Limitation to Right Heirs of Stranger—Co-heiresses.*—Co-heiresses becoming entitled under a limitation in a settlement of real estate to the right heirs of a person who took no interest in the property, take as *personæ designatæ*, and not as parceners but as joint tenants.—*Berens v. Fellowes*, 35 W.R. 356.
- (iii.) **Ch. D.**—*Independent Adviser—Usual Form—Rectification.*—A father settling money on his daughter at her marriage is not her natural agent so as to bind her to the terms of a settlement which is not in the usual form. A settlement containing an agreement to settle after acquired property of the wife, was rectified as to the after acquired property, by giving the wife a power of appointment by will in default of issue; the lady having had no independent advise, and not having been aware of the effect of the omission from the settlement of such power.—*Tucker v. Bennett*, 56 L.T. 119.
See Infant, p. 64, v.

Ship:—

- (iv.) **Q. B. D.**—*Charter Party—Advanced Freight Insured—Right to Recover—Subrogation.*—Goods were shipped on the defendants' ship under a charter party, according to which the freight was paid in advance, subject to a deduction for insurance. The advanced freight having been insured, and the goods lost by the negligence of the defendants; held, that the plaintiffs, who had purchased the goods at a price which included the amount of the advanced freight, were entitled to recover such amount as part of their damages, as the insurers who had indemnified the plaintiff were entitled to be subrogated to their rights, and to have the action maintained for their benefit.—*Dufourcet v. Bishop*, L.R. 18 Q.B.D. 373.
- (v.) **C. A.**—*Collision—Vessel at Anchor—Burden of Proof.*—The fact that one of two ships in collision is at anchor and can be seen is *prima facie* evidence of negligence on the part of the other ship, and casts on it the burden of proof to rebut the presumption of liability; e.g., by proving that the collision occurred through inevitable accident, or solely through the fault of a pilot who was on board through compulsion of law.—*The Indus*, L.R. 12 P.D. 46.
- (vi.) **C. A.**—*Collision—Damages for Loss of Life—Improper Navigation.*—Decision of P. D. (see Vol. 11, p. 130, vii.) reversed.—*The Bernina*, L.R. 12 P.D. 58; 56 L.J. P. 17; 56 L.T. 258; 35 W.R. 314.
- (vii.) **C. A.**—*Compulsory Pilotage—Tyne.*—Judgment of P. D. (see Vol. 12, p. 46, vi.) affirmed.—*The Johann Sverdrup*, L.R. 12 P.D. 43; 56 L.T. 256; 35 W.R. 300.

- (i.) **P. D.**—*Co-owners—Action of Restraint—Ship's Husband.*—An agreement whereby the plaintiff and the other co-owners of a ship appointed a person to discharge the duties of ship's husband and manager of the ship does not debar him from obtaining in an action of restraint bail from the other co-owners in the value of his shares.—*The England*, L.R. 12 P.D. 32; 35 W.R. 367.
- (ii.) **H. L.**—*Deck Cargo—Jettison—Bill of Lading—Proximate Cause of Damage.*—Goods shipped under a bill of lading, which contained an exception in favour of jettison, having been, in breach of contract with the shipper, stowed on deck, were properly jettisoned by the master; held, that the shipowner was liable for non-delivery of the goods, the exception applying only to goods properly stowed, and the cause of damage not being too remote.—*Royal Exchange Shipping Co. v. Dixon*, L.R. 12 App. Cas. 11; 56 L.T. 206.
- (iii.) **C. A.**—*Insurance—Policy on Advances on Ship*—19 Geo. II., c. 37, s. 1.—A policy insuring cash advances on a ship, and containing the term "full interest admitted," is void.—*Berridge v. Man, &c., Insurance Co.*, L.R. 18 Q.B.D. 346; 56 L.J. Q.B. 223; 35 W.R. 343.
- (iv.) **Q. B. D.**—*Insurance—Improper Navigation—Cause of Damage arising before Sailing.*—Damage to cargo caused by the negligent closing of a port, which was closed before the ship sailed, is loss caused by "improper navigation."—*Carmichael v. Liverpool Sailing-ship Owners' Association*, 56 L.J. Q.B. 208.
- (v.) **P. D.**—*Jurisdiction—Damage to Cargo—The Admiralty Court Act, 1861, s. 7.*—The owners of cargo cannot bring an action in rem against a vessel for damage to the cargo, if no part of the cargo was brought by the vessel proceeded against into any port of England or Wales.—*The Victoria*, L.R. 12 P.D. 105; 35 W.R. 291.
- (vi.) **P. C.**—*Insurance of Cargo—Insurable Interest—Commencement of Risk.*—Where the charterers of a ship have purchased a cargo to be shipped on board, and the master from time to time receives delivery, such delivery is a delivery to the purchasers, and they have an insurable interest in the cargo as received. Where there is an insurance of cargo on board, or to be shipped in, a vessel, the risk commences as soon as any portion is on board.—*The Colonial Insurance Co. of New Zealand v. The Adelaide Marine Insurance Co.*, L.R. 12 App. Cas. 128; 56 L.T. 173.
- (vii.) **P. D.**—*Pilotage—Port of Havre.*—Although pilotage is compulsory on ships entering the port of Havre, such pilot does not by French law supersede the master in the charge of the ship; therefore if the master allows the pilot to take entire charge, the owners are not exempt from liability for a collision caused by the pilot's negligence.—*The Augusta*, 56 L.T. 58.
- (viii.) **P. D.**—*Pilotage—Danube Rules.*—By the Rules for the navigation of the Danube, Arts. 85, 89, and 92, pilotage is compulsory, but the master is not required to give up the navigation to the pilot. Where, therefore, the master has given up the navigation to a pilot, the owners remain liable for damage caused by his improper navigation.—*The Agnes Otto*, L.R. 12 P.D. 56; 56 L.J. P. 45.
- (ix.) **P. D.**—*Practice—Discontinuance—Costs—R.S.C., 1883, O. xxvi., r. 1.*—In an action of damage by collision, when the defendant pleads compulsory pilotage, the plaintiff, on discontinuing his action, must pay the defendant's costs.—*The J. H. Henkes*, L.R. 12 P.D. 106; 35 W.R. 412.

- (i.) **P. D.—Salvage—Damages Recovered from Wrongdoing Ship—Merchant Shipping Act, 1854, s. 459.**—A ship having been lost by collision and nothing having been saved after payment of necessary expenses, there is nothing to which a claim for salvage of life can attach; and it cannot be preferred against the owners of the lost ship in respect of damages recovered by them from the vessel which was to blame for the collision.—*The Annie*, L.R. 12 P.D. 50; 35 W.R. 366.
- (ii.) **P. D.—Salvage—Assessment.**—In assessing salvage remuneration the Court takes into account, first, the value of the property saved, and next the perils from which it has been saved. The possibility of aid being rendered to the vessel in peril must be taken to lessen the amount to be awarded. The value of the salving vessel will not materially affect the amount, but the length of time during which she is exposed to additional risks is a material element for consideration.—*The Werra*, L.R. 12 P.D. 52.
- (iii.) **P. C.—Salvage—Reduction on Appeal.**—Salvage remuneration reduced on appeal to the Privy Council; their Lordships being of opinion that the difference between the sum awarded and that which would be liberal was so great as to require reduction.—*The Thomas Allen*, L.R. 12 App. Cas. 118.
- (iv.) **P. D.—Towage—County Court Jurisdiction—32 & 33 Vict., c. 51, s. 3, sub-s. 1—Duty of Tug.**—A County Court has jurisdiction to entertain a claim for damage for breach of a contract of towage. It is the duty of those on board a vessel in tow to give general directions to the master of the tug as to the towage. But he must exercise his discretion as to the proper manœuvres, especially where he is more competent to judge than the master of the vessel in tow.—*The Isca*, L.R. 12 P.D. 34; 56 L.J. P. 47; 55 L.T. 779; 35 W.R. 382.

Solicitor:—

- (v.) **C. A.—Costs—Taxation—General Order, August, 1882—Time of Undertaking Business—Notice of Election to First Mortgagee.**—Decision of Ch. D. (see Vol. 12, p. 47, iv.) affirmed.—*Hester v. Hester*, 56 L.J. Ch. 247; 55 L.T. 862.
- (vi.) **Ch. D.—Common Order to Tax—Retainer.**—The question of retainer can be raised on a common order to tax as to particular items or heads, but not as to the whole of a bill of costs. Where a bill of costs was divided into general costs and costs relating to a particular matter, the whole of the latter, except two small items, may be taxed off as having been incurred without authority.—*Re Herbert*, L.R. 34 Ch. D. 504.
- (vii.) **Ch. D.—Dealing with—Undue Influence—Setting Aside Deeds—Delay.**—There is no rule that where an unprofessional person deals as vendor or mortgagor with a solicitor he must have independent legal advice. Where the plaintiff being entitled to property of which his father was tenant for life, mortgaged it to a solicitor to secure advances to his father, the transaction being conducted by the solicitor; *held*, on the evidence of the plaintiff himself, that he had not been unduly influenced and could have no relief against the solicitor, but was entitled to an indemnity from his father. Delay in instituting a suit to set aside a deed does not bar a plaintiff whose interest in the property dealt with is still reversionary.—*Readdy v. Prendergast*, 55 L.T. 767.
- (viii.) **Q. B. D.—Guarantee of Client's Debt—Summary Order.**—A solicitor who has guaranteed payment of a debt due from his client may on default of payment by the client be ordered in a summary way to pay the debt.—*Re Pass*, 35 W.R. 410.

- (i.) **C. A.**—*Taxation—Solicitor Trustee—Profit Costs.*—Decision of Ch. D. (see Vol. 11, p. 133, ii.) varied.—A solicitor acting in legal proceedings for himself and co-trustees is entitled to profit costs if the costs have not been increased by his so acting. A solicitor trustee acting as a steward of a manor, part of the trust estate, is entitled to the usual steward's fees.—*Re Corsellis; Lawton v. Elwes*, 56 L.J. Ch. 294; 35 W.R. 309.

See Practice, p. 71, vii. Trustee, p. 82, vi.

Tenant for Life :—

- (ii.) **Ch. D.**—*Liability for Repairs.*—A devisee for life who is expressly directed by the will to keep the devised property in repair, is not excused from doing so by the fact that the testator himself had not kept the same property in repair, and had left it at his death in a dilapidated condition.—*Re Bradbrook; Lock v. Willis*, 56 L.T. 106.
- (iii.) **Ch. D.**—*Land and Heirlooms—Further Consideration—Security.*—It is not now the practice in ordinary cases, on further consideration of an administration action, to require a tenant for life to give security before being let into possession of land and heirlooms, but he is only required to sign an inventory of the latter.—*Temple v. Thring*, 56 L.T. 283.

Tolls :—

- (iv.) **Ch. D.**—*Exemption of Mails—Usage.*—On the construction of 25 Geo. III., c. 57; 36 Geo. III., c. 94; 3 Geo. IV., c. 126; 4 Geo. IV., c. 95; and 1 Vict., c. 32, the Royal Mails are exempt from tolls for using a bridge erected under 36 Geo. III., c. 94. Neither usage nor long-continued practice have any effect on such Acts.—*Northam Bridge Co. v. Reg.*, 55 L.T. 759.

Trade Mark :—

- (v.) **Ch. D.**—*Alteration of Register—Essential Particulars—Patents, Designs, and Trade Marks Act, 1883, ss. 91 & 92.*—Order made to alter a registered trade mark by altering a letter from English to Russian character and adding a word, the alterations being in non-essential particulars.—*Re Ermen & Roby's Trade Mark*, 56 L.J. Ch. 177; 56 L.T. 230.
- (vi.) **C. A.**—*Fancy Words—Registration.*—Decisions of Ch. D. (see Vol. 12, p. 18, vii., and p. 19, ii.) reversed.—*Re Van Duser's Trade Mark. Re Leaf's Trade Mark*, 35 W.R. 294.
- (vii.) **Ch. D.**—*Registration—Mark Resembling Another.*—The Comptroller may properly refuse to register a trade mark which so closely resembles a previously registered mark as to be likely to give rise to litigation if used, although the resemblance is not so close that the Court would grant an injunction against its use.—*Re Speer*, 55 L.T. 880.
- (viii.) **C. A.**—*Registration—Fancy Word—Patents, Designs, and Trade Marks Act, 1883, s. 64, sub-s. 1 (c.).*—Decision of Ch. D. (see Vol. 12, p. 48, iv.) reversed.—*Re Arbens, Trade Mark Gem*, 56 L.T. 252.
- (ix.) **C. A.**—*Refusal to Register—Appeal—Patents, Designs, and Trade Marks Act, 1883, ss. 62, 90.*—When the Comptroller refuses to register a trade mark, the applicant cannot appeal to the Court; but must appeal to the Board of Trade which has power to refer the appeal to the Court.—*Re Trade Mark Normal*, 56 L.T. 246.

Tramway :—

- (x.) **Q. B.**—*"Road Authority"—Repair of Road—Tramways Act, 1870, s. 3.*—A railway company which has for forty years repaired a bridge over

which a tramway company has by statute acquired a right to lay its rails may, for the purposes of repairs of the bridge required for the safety of the public, and after giving the statutory notices, remove the tramway lines, and is under no liability to the tramway company provided it causes as little inconvenience as possible.—*Wolverhampton Tramways Co. v. G. W. R.*, 56 L.J. Q.B. 190.

Trustee :—

- (i.) **Ch. D.**—*Appointment of Additional Trustee*—*Trustee Act*, 1850, s. 32—*Conveyancing Act*, 1881, s. 31, sub-s. 2.—The Court may, under the *Trustee Act*, 1850, appoint an additional trustee when there is no vacancy in the existing number of trustees. *Semble*, under the *Conveyancing Act*, 1881, an additional trustee can only be appointed on the occasion of filling a vacancy.—*Re Gregson's Trusts*, 56 L.J. Ch. 286; 35 W.R. 286.
- (ii.) **Ch. D.**—*Appointment of—Settled Land Act*, 1882, s. 38—*Conveyancing Act*, 1881, s. 31.—*Quære*, whether section 31 of the *Conveyancing Act* applies to trustees appointed for the purposes of the *Settled Land Act*. A new trustee can under the *Settled Land Act* appoint a new trustee in the place of a trustee for the purposes of the Act who retires.—*Re Wilcock*, L.R. 34 Ch. D. 508; 35 W.R. 450.
- (iii.) **Ch. D.**—*Appointment of New Trustee—Continuing Trustee*—*Conveyancing Act*, 1881, s. 31, sub-ss. 1, 3, 6, 7.—An objection to an appointment of a new trustee in the place of one who had been abroad more than twelve months, on the ground that the retiring trustee had not joined in the appointment, *overruled*, there being no evidence that he was willing or competent to join. *Semble*, that "continuing trustee" means a trustee who is to continue to act in the trusts after the completion of the appointment.—*Re Coates to Parsons*, L.R. 34 Ch. D. 370; 56 L.J. Ch. 242; 56 L.T. 16; 35 W.R. 375.
- (iv.) **Ch. D.**—*Appointment of New Trustees—Separate Sets*—*Trustee Act*, 1850—*Conveyancing Act*, 1882, s. 5.—Separate sets of trustees may be appointed for separate parts of property subject to trusts which are at present distinct, but which in certain events will coalesce.—*Re Hetherington's Trusts*, L.R. 34 Ch. D. 211; 56 L.J. Ch. 174; 55 L.T. 806; 35 W.R. 285.
- (v.) **Ch. D.**—*Constructive Trustee—Appointment of New Trustee—Vesting Order*.—The Court will not appoint a new trustee in the place of a constructive trustee on the ground of his incapacity, on a petition under the *Trustee Act*, 1850. A declaration having been made in an action that the incapacitated person was a trustee, the Court appointed a new trustee, but refused to make a vesting order, and directed an application in Lunacy. On an application in Lunacy the vesting order was made.—*Re Martin's Trusts*, 56 L.J. Ch. 229; 56 L.T. 241.
- (vi.) **Ch. D.**—*Defaulting—Solicitor to—Costs*.—Where a trustee would be ordered to pay trust money into Court without any deduction for costs, his solicitor, if he has trust money in his hands, must equally pay it in without deduction. The solicitor to a trustee has, in general, no lien on the trust estate for his costs, but must look to the trustee, by whom he is retained.—*Staniar v. Evans*; *Evans v. Staniar*, L.R. 34 Ch. D. 470; 56 L.T. 87; 35 W.R. 286.
- (vii.) **Ch. D.**—*Solicitor—Investment of Client's Money—Priority*.—The solicitor to the trustees of a settlement having invested on a mortgage security, taken in his own name, moneys belonging to the trust, the investment being treated in his books as a loan on behalf of the trust, and being made with the assent of the tenant for life, constitutes him-

self a trustee of the investment for the trustees of the settlement, though it was made without their knowledge; and they have priority over a person to whom the solicitor fraudulently pledges the security for his own debt, such person taking *bond fide*.—*Hartopp v. Huskisson*, 55 L.T. 773.

Vendor and Purchaser:—

- (i.) **Ch. D.—Condition of Sale—Interest.**—Where there is a condition that the purchaser shall pay interest on the purchase-money from the day fixed for completion in case of delay from any cause except the wilful neglect or default of the vendor, the purchaser cannot relieve himself from the liability by setting apart the purchase-money, and giving the vendor notice thereof.—*Re Riley to Streatfield*, L.R. 34 Ch. D. 386; 56 L.T. 48.
- (ii.) **Ch. D.—Covenant for further Assurance—Deed to enlarge Base Fee.**—A vendor who has covenanted for further assurance, may be required, when he can effectually do so, to execute a deed enlarging a base fee into a fee simple.—*Bunkes v. Small*, L.R. 34 Ch. D. 415; 56 L.J. Ch. 254; 56 L.T. 21; 35 W.R. 288.
- (iii.) **Ch. D.—Forfeiture of Deposit—Defect in Title subsequently discovered.**—A purchaser who, after accepting the vendor's title, abandons his contract and forfeits his deposit, cannot, on the subsequent discovery by a third party of a defect in the vendor's title, claim return of the forfeited deposit.—*Soper v. Arnold*, 35 W.R. 451.
- (iv.) **Ch. D.—Non-Mutuality—Contract formed by Letters.**—The doctrine that non-mutuality of a contract is a bar to specific performance, does not apply to a contract which to the knowledge of both parties cannot be performed by either till after the occurrence of a contingent event. Where the plaintiff wrote to the defendant asking for a letter agreeing to purchase at a price named half an acre previously selected out of a plot of land, and the defendant replied, not expressly referring to the plaintiff's letter, that she was willing to take half an acre of the land as agreed on at the price named, the two letters formed a valid contract.—*Wylson v. Dunn*, L.R. 34 Ch. D. 569; 56 L.T. 192; 35 W.R. 405.
- (v.) **C. A.—Sale under Power in Mortgage Deed—Receipt for Purchase Money.**—Decision of Ch. D. (see Vol. 12, p. 50, iii.) affirmed.—*Re Parker and Beech's Contract*, 56 L.T. 95.
- (vi.) **Ch. D.—Specific Performance—Compulsory Purchase—Assignment.**—A local authority, having compulsory powers of purchase, gave notice to a landowner to treat. The land having been conveyed to the plaintiffs, subject to the claim of the local authority; *held*, that the plaintiffs could maintain an action against the local authority for specific performance, without joining as plaintiff the landowner to whom notice was given.—*Burr v. Wimbledon Local Board*, 35 W.R. 404.

Voluntary Gift:—

- (vii.) **Ch. D.—Independent Advice—Laches.**—When a person after consideration and taking the advice of her friends, enters a sisterhood, and thereupon takes vows of poverty and of obedience to her superior, transfers of her property made subsequently are ministerial acts to complete the previous gift, and it is not necessary in order to maintain them to shew that she had independent advice. When a trust fund is earmarked and is still in existence a plaintiff who establishes a claim to it cannot be defeated by reason of laches.—*Allcard v. Skinner*, 56 L.T. 184; 35 W.R. 424.

Wagering:—

- (i.) **Q. B. D.**—*Note Given for Gaming Debt—Indorsement—8 & 9 Vict., c. 109, s. 18.*—The consideration for a bill of exchange or promissory note given in respect of gaming debts, being void only and not illegal, an indorsee for value can recover on it, and notice of its having been given in respect of such debts does not affect the right to recover.—*Lilley v. Rankin*, 55 L.T. 814.

Will :—

- (ii.) **Ch. D.**—*Construction—Codicil—"Remain Undisposed of."*—A gift of residue to testator's widow for her own absolute use with a gift over, expressed to be without prejudice to her absolute power of disposal, of any part which at her death should "remain undisposed of," the gift being made by a codicil which revoked a will by which the residue was given to her absolutely, confers on her an estate for life with power of disposal by act *inter vivos*, but not by will.—*Williams v. Pounder*; *re P.*, 56 L.J. Ch. 118; 56 L.T. 104.
- (iii.) **Ch. D.**—*Construction—Gift of Rents and Income—Life, or Absolute Interest.*—A gift of rents and income of all real and personal estate, held, to confer an absolute interest, although there were legacies to the same person, and although the will contained directions for investment, and that the devisee and legatee should be at liberty to lay out a sum of money in erecting a monument.—*Re Coward*; *Coward v. Larkman*, 56 L.T. 278.
- (iv.) **C. A.**—*Construction—Lapse—Gift to a Peer by his Title.*—A gift of a chattel to Lord S. is a gift to the individual who holds that title at the date of the will, and lapses by his death in the testator's lifetime. Parol evidence to shew that the testator intended the gift for the person who should be Lord S. at his death, is not admissible.—*Re Whorwood*; *Ogle v. Lord Sherborne*, L.R. 34 Ch. D. 446; 56 L.T. 71; 35 W.R. 342.
- (v.) **Ch. D.**—*Construction—Misdescription.*—A testator gave to his wife the lease of the house in which he should be living at his death. At the date of the will he was living in a house held for a short term at a rack-rent; he subsequently bought a freehold house, in which he resided and died; held, that the freehold house did not pass to the widow.—*Re Knight*; *Knight v. Burgess*, L.R. 34 Ch. D. 518.
- (vi.) **Ch. D.**—*Construction—Gift over on Death or Second Marriage.*—When a fund is directed on the death or second marriage of the tenant for life, to be divided among the children of the tenant for life living at her death, the fund is on her second marriage to be immediately distributed.—*Re Tucker*; *Bowchier v. Gordon*, 56 L.T. 118; 35 W.R. 344.
- (vii.) **Ch. D.**—*Construction—Contingent Remainder or Executory Devise.*—The will of a testator, who died before the Contingent Remainders Act, 1877, contained a devise to trustees on trust for a person for life, with legal limitations over to such of her children as should attain twenty-one. The trustees were empowered to receive the rents during the minority of any child actually or presumptively entitled and apply them for his maintenance and accumulate the surplus for his benefit; held, that the testator intended that children who had not attained twenty-one on the death of the tenant for life should take a share on attaining that age, and that the limitations must therefore be construed as executory devises.—*Re Bourne*; *Rymer v. Harpley*, 35 W.R. 369.

- (i.) **Ch. D.**—*Construction—Vested or Contingent Gift—Remoteness.*—A gift of £5,000 to A. for life, and on her death the interest to be appropriated to the maintenance of her children, "and the principal to be divided amongst them as they shall severally attain the age of twenty-five years," gives the children of A. vested interests on her death, and is not void for remoteness.—*Re Bevan's Trusts*, 56 L.T. 277; 35 W.R. 400.
- (ii.) **C. A.**—*Construction—Striking out Names.*—Decision of Ch. D. (*see* Vol. 10, p. 123, x.) affirmed.—*Stephenson v. Stephenson*, 56 L.T. 75.
- (iii.) **Ch. D.**—*Construction—Legacy charged on Real Estate—Exoneration of Personalty.*—Bequest of a legacy on trust for A. for life, and after her death to revert to and be added to the general residuary personal estate; bequest of residuary personal estate to B.; devise of real estate to pay legacies in aid of personalty and subject thereto to B. *Held*, that the legacy was to be restored, after the death of A., to the funds from which it was taken, and was not to be taken from the real estate merely to augment the personalty. The personal estate having proved insufficient, but B. having satisfied the annual payments to A. in respect of the legacy, *held*, after B.'s death, that he had a vested interest in the charge on his own real estate, and that, as it was neither necessary or expedient that the charge should be raised, his personal representatives could not insist on it being raised.—*Re Duke of Somerset; Thynne v. St. Maur*, 55 L.T. 753.
- (iv.) **P. D.**—*Probate—Codicil executed on Margin of Will—Wills Act, s. 9.*—A codicil, the signature and attestation of which is placed on the margin of the will, having been regarded by the testator as an alteration in the will, is not duly executed, and cannot be admitted to probate.—*In the goods of Benjamin Hughes*, L.R. 12 P.D. 107.
- (v.) **P. D.**—*Probate—Practice—Citation to see Proceedings.*—In a probate suit the persons interested in establishing an intestacy were the widow and heir-at-law of the testator. The widow was a lunatic, confined in an asylum in Australia, and, as the heir-at-law was party to the suit, the Court refused to cite her to see proceedings.—*Ward v. Huckle*, L.R. 12 P.D. 110.
- See Limitations*, p. 65, vii.

Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times
Reports, and Weekly Reporter,

FOR MAY, JUNE, AND JULY, 1887.

By C. H. LOMAX, M.A., of the Inner Temple,
Barrister-at-Law.

Administration :—

- (i.) **Ch. D.**—*Donatio Mortis Causâ—Resumption of Possession.*—Deceased in his last illness shewed his daughter a deposit note, and told her that it was to belong to her in the event of his death. The daughter took the note and by the direction of the deceased placed it for safe custody in a cash-box which was kept in his bedroom, but of which she kept the key, and to which she had resort for household purposes. *Held*, a good *donatio mortis causâ*.—*Taylor v. Taylor*, 56 L.J. Ch. 597.
- (ii.) **Ch. D.**—*Insolvent Estate—Transfer to Bankruptcy—Bankruptcy Act, 1883, s. 125, sub-s. 4.*—The Court may transfer the administration of an insolvent estate to the Bankruptcy Court on the application of a creditor whose debt is admitted or proved, notwithstanding that an administration judgment has been pronounced. A creditor is not too late in applying for a transfer if he applies as soon as it appears that the estate will be insolvent. The fact that the administrator claims a right of retainer is no objection to making the order.—*Atkinson v. Powell*, 56 L.J. Ch. 552; 56 L.T. 704; 35 W.R. 609.
- (iii.) **P. D.**—*Intestacy—No Known Relations—Nominee of Duchy of Lancaster.*—An intestate domiciled in Lancashire having died without any known relations, and his estate having been partly administered by his widow, the Court at her death made a grant *de bonis non* to her residuary legatee the nominee of the Duchy of Lancaster.—*In the goods of Avaré*, 56 L.T. 673.

Attachment :—

- (iv.) **C. A.**—*Naval Officer—Full Pay.*—The full pay of an officer in the Royal Navy on active service cannot be attached.—*Apthorpe v. Apthorpe*, 35 W.R. 728.

G

Bankruptcy:—

- (i.) **C. A.**—*Appeal—Person Aggrieved—Bankruptcy Act, 1883, ss. 20, 104, 105, 109.*—The official receiver having applied for an adjudication of bankruptcy against debtors against whom a receiving order has been made, is entitled to appeal as a person aggrieved against an order of the registrar adjourning the hearing of the application.—*E. p. Official Receiver; in re Reed and Bowen, 35 W.R. 660.*
- (ii.) **C. A.**—*Arrangement with Creditors—Debt incurred by Fraud—Debtors Act, 1869, s. 15—Bankruptcy Act, 1869, s. 28—Statute of Limitations.*—A broker who sells bonds deposited with him for custody and misappropriates the proceeds incurs a debt by fraud, which is not discharged by an arrangement with his creditors. Where the fraud is not discovered until after a bankruptcy adjudication against the debtor no action can be brought while the bankruptcy is in force, and the Statute does not begin to run till the bankruptcy is annulled.—*Munns v. Burn; in re Crossley, L.R. 35 Ch. D. 266.*
- (iii.) **C. A.**—*Books of Account—Bankruptcy Act, 1883, s. 28, sub-s. 3.*—Decision of Q. B. D. (*see Vol. 12, p. 54, vii.*) affirmed.—*E. p. Board of Trade; re Mutton, L.R. 19 Q.B.D. 102; 56 L.J. Q.B. 395; 35 W.R. 561.*
- (iv.) **Q. B. D.**—*Breach of Trust—Partners—Proof—Bankruptcy Act, 1883, s. 37, Sched. II., r. 18.*—Trust funds were handed for investment to a firm in which one of the trustees was a partner. The firm misappropriated the funds, and became bankrupt. *Held*, that proof for the amount misappropriated might be made both against the joint estate of the firm, and the separate estate of the defaulting trustee.—*E. p. Sheppard; in re Parkers, L.R. 19 Q.B.D. 84; 56 L.J. Q.B. 338; 35 W.R. 566.*
- (v.) **C. A.**—*Completion of Contract by Trustee—Assignment of Money due under Contract.*—A building contract provided for the retention till completion of a portion of the instalments payable on account, and empowered the owner, on the contractor committing an act of bankruptcy, to discharge him, and employ another person to complete the work, and to deduct the amount paid to such person from the contract price. The contractors assigned by way of mortgage a part of the money retained, and afterwards filed a petition for liquidation. The trustee in liquidation completed the work, and advanced money for the purpose. *Held*, that the trustee must be taken to have completed the work as trustee of the contractor's estate, and not as a person substituted by the owners, and that the mortgagees were entitled as against him to the money retained.—*Drew v. Josolyne, L.R. 18 Q.B.D. 590; 35 W.R. 570.*
- (vi.) **C. A.**—*Composition—Power of Court to enforce—Bankruptcy Act, 1883, ss. 18, 23.*—The Court has the same power to enforce payment of a composition agreed to after an adjudication of bankruptcy, as it has to enforce payment of one agreed to before adjudication.—*E. p. Godfrey; in re Lazarus, L.R. 18 Q.B.D. 670; 56 L.J. Q.B. 369; 35 W.R. 533.*
- (vii.) **C. A.**—*“Conduct” of Bankrupt—Bankruptcy Act, 1883, ss. 24, 28—Refusal to Submit to Medical Examination.*—The Court cannot, on an application for an order of discharge, take into consideration as “conduct” of the bankrupt his refusal to submit to a medical examination for the purpose of enabling an insurance on his life to be effected for the better realisation of his reversionary interest in property.—*E. p. Board of Trade; re Betts and Block, L.R. 19 Q.B.D. 39; 56 L.J. Q.B. 870; 35 W.R. 530.*

- (i.) **Q. B. D.**—*Discharge—Board of Trade—Appeal—Bankruptcy Rules*, 1886, r. 237.—Rule 237 is not *ultra vires*, and the Board of Trade has a right to appeal from an order made by the Court on an application by the bankrupt for his discharge.—*E. p. Board of Trade; in re Stainton*, 35 W.R. 667.
- (ii.) **Q. B. D.**—*Disclaimer of Lease—Notice to Parties out of Jurisdiction—Bankruptcy Act*, 1883, s. 55, sub-s. 3.—Notice of motion by a trustee in bankruptcy to disclaim a lease may be served on parties interested, who are out of the jurisdiction in the ordinary way.—*E. p. Paterson; in re Rathbone*, 35 W.R. 735.
- (iii.) **Q. B. D.**—*Discovery of Debtor's Property—Bankruptcy Act*, 1883, s. 27—*Bankruptcy Rules*, r. 88.—A person who, being examined as to the debtor's dealings and property, produces certain letters torn out of a letter-book, and swears that the book contains no other letters relating to the debtor, his dealings, or his property cannot be compelled to produce the book.—*Re Purvis; e. p. Rooke*, 56 L.T. 579.
- (iv.) **Q. B. D.**—*Disqualifications of Bankrupt—Certificate of Removal—Bankruptcy Act*, 1883, s. 32, sub-s. 2 (b).—The editor of a newspaper was sentenced to imprisonment for libel. While he was in gaol all his property was sold under a bill of sale given for the purposes of his defence, and he subsequently presented a bankruptcy petition. *Held*, that the County Court Judge was right in refusing to grant a certificate that the bankruptcy was caused by misfortune without any misconduct on the bankrupt's part.—*E. p. Burgess; in re Burgess*, 35 W.R. 702.
- (v.) **Q. B. D.**—*Husband and Wife—Money Lent by Wife—Proof—Married Women's Property Act*, 1882, s. 3.—Money lent by a wife to a husband for his private purposes may be proved for *pari passu* with other creditors.—*E. p. Tidswell; in re Tidswell*, 35 W.R. 669.
- (vi.) **Q. B. D.**—*Married Women's Property Act*, 1882, s. 3—*Loan by Wife to Husband and Partner*.—A married woman who has lent money to her husband and his partner may prove in the bankruptcy of the firm *pari passu* with the other creditors.—*Re Tuff and Nottingham*, L.R. 19 Q.B.D. 88; 56 L.T. 573; 35 W.R. 567.
- (vii.) **Q. B. D.**—*Money Paid for Benefit of Estate—Repayment*.—Money which had, at the request of the creditors, been advanced before a receiving order to save the debtor's goods from distress for rent, was ordered to be repaid to the official receiver after deducting his costs.—*E. p. Love-ring; in re Ayshford*, 35 W.R. 652.
- (viii.) **Q. B. D.**—*Practice—Evidence—Use of—Bankruptcy Act*, 1883, ss. 48, 97.—The answers of a bankrupt in his public examination are not admissible in evidence in subsequent motions in the same bankruptcy against parties other than the bankrupt.—*Board of Trade, e. p.; re Brunner*, 35 W.R. 719.
- (ix.) **Q. B. D.**—*Proof—Set-off—Defaulting Trustee*.—Where a sum has been found due to an estate from a defaulting trustee who is also a beneficiary, the estate can prove in the bankruptcy of the trustee, only for the amount of the debt less the beneficial share of the bankrupt in the estate.—*E. p. Parker; in re Chapman*, 35 W.R. 595.
- (x.) **Q. B. D.**—*Proof—Judgment for Costs—Action brought before Receiving Order—Locus Standi of Bankrupt—Bankruptcy Act*, 1883, s. 37, Sched. II., r. 25.—A verdict and judgment for costs having been given after the receiving order against the debtor in an action which he had brought before the receiving order, *held*, that the costs were not

proveable. *Held*, also, that the bankrupt had *locus standi* to apply to expunge the proof, his proposals for a scheme of arrangement having been rejected by reason of the vote given by the party holding the proof.—*E. p. Bluck*; *in re Bluck*, 35 W.R. 720.

- (i.) **C. A.**—*Property of Bankrupt—Contingent Interest—Possibility—Policy of Insurance—Introduction of Foreign Law.*—A policy of insurance on the life of a husband effected with a New York Office for the benefit of his wife provided that the amount assured should be paid to the wife "for her sole use, if living, in conformity with the statute;" *held*, not to incorporate a statute of New York which gave the husband's creditors a right to a portion of the policy money. The money was payable if the wife was not living to the children, and if there were no children to the executors or assigns of the husband; there was a provision that the legal holder might after ten years withdraw the sum appropriated to the policy. The wife withdrew such sum, the husband having filed a liquidation petition and obtained his discharge; *held*, that the husband's contingent interest, being a mere possibility, did not pass to the trustee.—*E. p. Dever*; *in re Suse and Sibeth*, L.R. 18 Q.B.D 660.
- (ii.) **Q. B. D.**—*Salary—Terminable by Notice—Bankruptcy Act, 1883, s. 53, sub-s. 2.*—An order may be made on a bankrupt to pay his trustee a yearly sum out of a salary of which he is in receipt, though the employment on which the salary depends is terminable on a week's notice.—*Re Brindle*; *e. p. Brindle*, 56 L.T. 498; 35 W.R. 596.
- (iii.) **C. A.**—*Scheme of Arrangement—Powers Available—Bankruptcy Act, 1883, ss. 18 (sub-ss. 6, 12, 13), 27.*—Powers of discovery of the debtor's property cannot be incorporated into a private scheme of arrangement; and a scheme which cannot make such power applicable, when they are in fact needed, will be considered "not reasonable or not calculated to benefit the general body of creditors."—*E. p. Bischoffsheim*; *re Aylmer*, L.R. 19 Q.B.D. 33; 35 W.R. 532.
- (iv.) **C. A.**—*Settlement—Avoidance—Bankruptcy Act, 1883, s. 47, sub-s. (1).*—A deed containing no covenant but purporting to transfer certain shares for the benefit of the settlor's wife and children is not a settlement. The transfer of the shares when made is a settlement and is made void by the settlor's bankruptcy within two years of its date.—*E. p. Todd*; *in re Ashcroft*, 35 W.R. 676.
- (v.) **Q. B. D.**—*Post-Nuptial Settlement—Solvency of Settlor—Bankruptcy Act, 1883, s. 47.*—The life interest of the settlor under a post-nuptial settlement must be taken into account in estimating his solvency at the date of the settlement, for the purpose of an application to set aside such a settlement made less than ten years before the bankruptcy of the settlor; and the settlement is not invalidated by the fact that the settlor's life interest passes directly to himself, and not to the trustees of the settlement.—*Re Lowndes*; *e. p. The Trustee*, L.R. 18 Q.B.D. 677; 56 L.T. 574; 35 W.R. 549.
- (vi.) **Q. B. D.**—*Stoppage in Transitu—Sale to Agent of Foreign Principal—Delivery on Principal's Ship—Mate's Receipts.*—The seller of goods to foreign principals through an English agent, having delivered the goods on the principal's ship, knowing it to be such, and taken mate's receipts which he has handed over to the agent, has lost his right to stop the goods *in transitu*.—*Re Bruno Silva & Son*; *e. p. Francis and Co.*, 56 L.T. 577.

- (i.) **Q. B. D.**—*Transfer of Proceedings—Notice—Bankruptcy Rules, 1886, r. 18.*—Notice of an application to transfer the proceedings in a bankruptcy from a County Court to a High Court, or *vice versa*, must be served on the official receiver.—*Re Jack*, L.R. 18 Q.B.D. 682; 35 W.R. 735.

See Landlord and Tenant, p. 102, ii.

Bill of Sale:—

- (ii.) **Q. B. D.**—*Certain Time of Payment—Condition in Ease of Debtor.*—A covenant by the grantee in a bill of sale, by which the principal was made payable on a certain date, to the effect that if the grantor did not break any of the covenants contained in the bill, payment should be accepted by instalments on specified dates, does not make the time of payment uncertain or invalidate the bill of sale.—*Re Coton; e. p. Payne*, 56 L.T. 571; 35 W.R. 476.
- (iii.) **Q. B.**—*Landlord and Tenant—Power to Distrain for Money due to Landlord—Bills of Sale Act, 1878, s. 4—Bills of Sale Act (1878), Amendment Act, 1882, s. 8.*—An agreement for letting a public-house which empowers the landlord to enter and distrain for money due to him from the tenant in respect of the supply of liquors requires registration as a bill of sale.—*Pulbrook v. Ashby & Co.*, 56 L.J. Q.B. 376.
- (iv.) **Ch. D.**—*Memorandum of Sale by Auctioneer—Statute of Frauds, s. 17—Bills of Sale Act, 1878, s. 4.*—The memorandum made by an auctioneer of the sale of goods to an amount exceeding £10, there being no receipt of the goods by the buyer, or part payment, is essential to the validity of the sale, and must be registered as a bill of sale.—*Evans v. Thomas; in re Roberts*, 35 W.R. 684.
- (v.) **Q. B. D.**—*Registration—Renewal—Mistake—Rectification of Register—Bills of Sale Act, 1878, ss. 8, 11, 14.*—A Judge in chambers has power in his discretion to allow the renewal of a registration after time, the renewal having been omitted through inadvertence, and to allow the rectification of a clerical error in the register.—*In re Dobbin's Settlement*, 56 L.J. Q.B. 295.
- (vi.) **Ch. D.**—*Sale of Chattels—Vendors' Lien—Bills of Sale Act, 1878, ss. 4, 8.*—The plaintiff and A. agreed to sell to A. a business and stock-in-trade, the vendors to have a lien for the purchase money, which was payable by instalments, the whole to become payable on A.'s bankruptcy. A. took possession and became bankrupt before payment. Held, that the agreement was a sale and regrant, and should have been registered as a bill of sale.—*Coburn v. Collins*, L.R. 35 Ch. D. 373; 56 L.J. Ch. 504; 56 L.T. 431; 35 W.R. 610.
- (vii.) **Q. B. D.**—*Power to Purchase Goods at a Valuation—Bills of Sale Act, 1878, Amendment Act, 1882, s. 9.*—A power in a bill of sale to the grantee to sell the goods "or to have them valued, and to purchase them at such valuation, and receive the moneys to arise from such sale or valuation," is not a term for the maintenance of the security, and makes the bill of sale void.—*Lyon v. Morris*, L.R. 19 Q.B.D. 139; 56 L.J. Q.B. 378; 35 W.R. 707.
- (viii.) **C. A.**—*Sale under Void Bill of Sale—Affirmance.*—The grantor of a bill of sale on furniture became bankrupt, and entered the grantees in his statement of affairs as secured creditors for the sum secured by the bill of sale. The landlord having put in a distress for rent, the grantees seized and sold the furniture; the balance of the proceeds, after paying the rent, was insufficient to pay their debt, and, having received a dividend, they gave a receipt in full. On the grantor suing them for

wrongful seizure, on the ground that the bill of sale was void; held, that, though the bill of sale was void, the plaintiff, having gained an advantage by treating it as void, was estopped from treating it as invalid.—*Roe v. Mutual Loan Fund Association*, 35 W.R. 723.

- (i.) **Q. B. D.**—*Validity—Instalments—Interest Made Payable before Due.*—A bill of sale which makes the sum secured payable by instalments, which are calculated by adding together the whole amount of principal and interest, and dividing the sum by the number of instalments, and which provides that on failure to pay any instalment the whole should become due, is void because it makes interest payable on a day certain, irrespective of the period at which it would become due according to the ordinary course of events.—*Roe v. Mutual Loan Fund Association*, 56 L.T. 632.
- (ii.) **C. A.**—*Validity—Power to pay Expenses—Conveyancing Act, 1881, s. 19—Bills of Sale Act, 1882.*—The provisions of the Conveyancing Act, 1881, are not incorporated in a bill of sale drawn in accordance with the form in the schedule to the Bills of Sale Act, 1882. A power given to the grantee in a bill of sale to apply moneys, raised by a sale, in paying "expenses incurred in relation to this security," renders the bill of sale void.—*Calvert v. Thomas*, 35 W.R. 616.

Building Society :—

- (iii.) **H. L.**—*Withdrawing Members—Depreciation of Assets.*—Where the rules of a building society provide for the withdrawal, by unadvanced members, of the amounts standing to their credit, and do not provide for the manner in which losses are to be borne, such members are entitled to withdraw the amount in full; and a resolution of the society that, in consequence of depreciation of the assets, a percentage should be deducted from the amount credited to each member, is invalid.—*Auld v. Glasgow Working Men's Building Society*, L.R. 12 App. Cas. 197; 56 L.T. 777; 35 W.R. 632.

Burial Ground :—

- (iv.) **Q. B. D.**—*Distance from Dwelling-House—18 & 19 Vict., c. 128, s. 9.*—The distance from a dwelling-house, within which burials are forbidden, must be measured from the wall of the house, not from the curtilage.—*Wright v. Wallasey Local Board*, L.R. 18 Q.B.D. 783; 56 L.J. Q.B. 259.

Carrier :—

- (v.) **C. A.**—*Measure of Damages—Delay.*—A railway company having negligently failed to deliver a parcel which to the knowledge of the company contained samples, until the season at which the samples could be used for procuring orders had passed, so that the samples had become valueless, is liable in damages for the value of the samples at the time when they should have been delivered.—*Schulze v. G. E. R. Co.*, L.R. 19 Q.B.D. 30.

Charity :—

- (vi.) **C. A.**—*Charitable Bequest—Failure of Particular Intention—Cy-près.*—Decision of Ch. D. (see Vol. 12, p. 26, vi.) affirmed.—*Biscoe v. Jackson*, 56 L.J. Ch. 540; 56 L.T. 753; 35 W.R. 554.
- (vii.) **Ch. D.**—*Charity Commissioner—Jurisdiction—"Charity Property"*—*City of London Parochial Charities Act, 1883, ss. 5, 10, 11.*—Land was vested in trustees under an Act of Parliament, by which it was provided that the land should be held "for the use and benefit of the

parish." A workhouse was built on the land out of monies raised by charges on the rates. The workhouse being no longer required; *held*, that the property was "charity property," and subject to the jurisdiction of the Charity Commissioners.—*Re St. Botolph Without Bishopsgate Parish Estates*, L.R. 35 Ch. D. 142; 35 W.R. 688.

Churchwardens :—

- (i.) **Q. B. D.**—*Authority of—Free Seats—Distribution—Violent Behaviour*—23 & 24 Vict., c. 32, s. 2.—Churchwardens of a church with free seats have authority to distribute such seats among certain classes of the congregation, for the maintenance of order. A person may be convicted of violent behaviour in church, though such behaviour was in assertion of a *bond fide* claim of right.—*Asher v. Calcraft*, L.R. 18 Q.B.D. 607; 56 L.J. M.C. 57; 56 L.T. 490; 35 W.R. 651.

Colonial Law :—

- (ii.) **P. C.**—*Lower Canada—Contract—Consideration.*—The French Law, which prevails in Lower Canada, is the same as the English law, on the subject of consideration for a contract. The sale of an alleged claim against a company for services rendered, which claim, though not admitted, was not rejected by the company, is a sufficient consideration to support an action for the purchase money.—*McGreery v. Russell*, 56 L.T. 501.

Common :—

- (iii.) **Ch. D.**—*Inclosure Act—Construction.*—Inclosure Commissioners were directed by their Act to allot a portion of the waste for a turf common, to be held by the lord in trust for the occupiers of certain cottages; allotments were directed to be made to the lord and the owners of the cottages, in lieu of their rights in respect of the parts of the waste which should be divided and allotted under the Act. *Held*, that the soil of the turf common remained vested in the lord, subject to a perpetual trust in favour of the occupiers of the cottages, the owners of the cottagers having no rights in respect thereof. *Held*, also, that the trust was not charitable.—*Re Christchurch Inclosure Act*, L.R. 35 Ch. D. 855; 56 L.T. 706; 35 W.R. 538.

Company :—

- (iv.) **Ch. D.**—*Directors—Liability—Payments after Winding-up—Companies Act, 1862, ss. 153, 165.*—After presentation of a winding-up petition on the ground that the company had not carried on business for a year, the directors issued new shares, and made payments to present the appearance of carrying on business. *Held*, that the directors were liable for all moneys expended by them since the commencement of the winding-up not in the ordinary course of business.—*Re Neath Harbour Smelting Works Co.*, 56 L.T. 727.
- (v.) **Ch. D.**—*Issue of fully paid-up Shares—Registration of Contract—Companies Act, 1867, s. 25.*—A contract relating to the issue of fully paid-up shares is registered at the issue of the shares if the registration and the issue are substantially contemporaneous, as where the registration was effected the day after the issue, the issue having taken place too late in the day for the registration to be effected on the same day.—*Pool v. Tunnel Mining Co.*, 35 W.R. 565.

- (i.) **Ch. D.**—*Liquidator—Liability for Costs—Higher Scale—Companies Act, 1862, ss. 94, 95—R. S. C., 1883, O. lxx., r. 9.*—The official liquidator who defends an action in the name and on behalf of the company is not personally liable for costs. Although a case as presented to the court is not of special difficulty, leave will be given to tax all or part of the costs on the higher scale if it appears that the difficulty was removed by the expenditure of time, money, and learned industry.—*Fraser v. Provinces of Brescia Steam Tramways Co.*, 56 L.T. 771.
- (ii.) **H. L.**—*Mortgage—Unregistered—Officer—Companies Act, 1862, s. 43.*—An unregistered mortgage in favour of a director or officer of the company is not void as against general creditors.—*Wright v. Horton*, 56 L.T. 782.
- (iii.) **Ch. D.**—*Public Undertaking—Debentures—Judgment—Receiver—Companies Clauses Consolidation Act, 1845, s. 41.*—In an action by a debenture holder on behalf of himself and the other holders of an issue of £15,000 debentures, the Court declared that the holders of that issue were entitled to stand in the position of judgment creditors for £15,000 and the interest due, and appointed a receiver of all the property of the company which was subject to seizure by a judgment creditor.—*Hope v. Croydon & Norwood Tramway Company*, L.R. 34 Ch. D. 730; 35 W.R. 594.
- (iv.) **C. A.**—*Promoter—Secret Profits—Rescission Impossible.—Decision of Ch. D. (see Vol. 12, p. 28, iii.) affirmed.—Ladywell Mining Co. v. Brooks*, 56 L.T. 677.
- (v.) **C. A.**—*Prospectus—Misstatement—Construction.*—In an action for fraudulent misstatements in the prospectus of a company, the construction of the prospectus is for the Judge not for the jury.—*Moore v. Explosives Co.*, 56 L.J. Q.B. 235.
- (vi.) **Ch. D.**—*Prospectus—Misrepresentation—Rescission of Contract to take Shares.*—When a shareholder has been induced to take shares by fraudulent misrepresentations in the prospectus, he is not deprived of his right to have the contract rescinded, by the fact that he has, before discovering the fraud, sold some of his shares.—*Re The Mount Morgan Gold Mine*; *e. p. West*, 56 L.T. 622.
- (vii.) **Ch. D.**—*Reduction of Capital—Petition—Advertisement—Companies Acts, 1867 & 1877.*—The Court will not, as a matter of course, dispense with the advertisement of a petition for reduction of capital where there are no creditors. But where there were only creditors for small current accounts, and the proposed reduction would not alter the liability of the shareholders in respect of uncalled capital, the advertisement was dispensed with.—*Re The E. C. Powder Co.*, 56 L.T. 610.
- (viii.) **Ch. D.**—*Transfer of Stock—Unregistered—Title of Transferee—Companies Clauses Act, 1845, ss. 14, 15, 16, 17.*—In the case of stock which is issued under the Companies Clauses Act, 1845, it is essential to the validity of a transfer that the deed should be delivered to, and kept by, the secretary of the company; therefore, when a transfer was returned by the company because it was improperly stamped and the stock certificate was not sent with it, the legal title to the stock did not pass by the transfer.—*Nanney v. Morgan*, 35 W.R. 713.
- (ix.) **Ch. D.**—*Winding-up—General Lien—Companies Act, 1862, s. 153.*—Under an agreement between a colliery company and a railway company for the carriage of coal, the waggons of the colliery were made subject to a general lien for money due to the railway for carriage, "such lien to take effect in case of bankruptcy, insolvency, or stoppage

of payment." The colliery company became insolvent, and a winding-up petition was presented. *Held*, that the lien was good as regards waggons which were in the possession of the railway when the petition was presented, and also as regards those which came into its possession after that date and before the winding-up order.—*Re Llangennech Coal Company*, 56 L.T. 475.

- (i.) **Q. B. D.**—*Winding-up—Goods Supplied to Liquidator—Companies Act, 1862, ss. 95, 131.*—In an action for the value of goods supplied to the liquidator of a company, it is not a good defence that the purchase of the goods was not required for the beneficial winding-up of the company.—*Bateman v. Ball*, 56 L.J. Q.B. 291.
- (ii.) **Ch. D.**—*Winding-up—Costs of Liquidator's Agent—Arrest of Scotch Assets.*—A Scotch solicitor having been employed by the liquidator of a company to get in the Scotch assets, on condition that the liquidator was not to be personally liable for his costs, which were to be recovered from the assets of the company, was restrained from suing the liquidator in Scotland, and from arresting Scotch assets of the company.—*In re Hermann Loog*; *Ramsay's case*, 35 W.R. 687.
- (iii.) **Ch. D.**—*Winding-up Petition—Withdrawal—Costs.*—A shareholder having presented a petition for winding-up, containing a statement that in the event of the company passing resolutions for a voluntary winding-up, he would be willing to withdraw it, and such resolutions having been passed; *held*, that the petition ought, under the circumstances, to be dismissed without costs.—*In re District Bank of London*, 35 W.R. 664.
- (iv.) **Ch. D.**—*Ancient Fishery—Winding-up—Discretion—Companies Act, 1862, ss. 89, 199.*—Where members of a company, being freemen of a manor, had, under charters and an Act of Parliament a sole right to breed and fish for oysters; *held*, that the company could be wound up as an unregistered company; *held*, also, that the Court had no discretion, and could not disregard the wishes of creditors, but that the winding-up could be suspended if occasion required.—*Re Company of Free Fishermen of Faversham*, 56 L.T. 422.

Contract:—

- (v.) **Ch. D.**—*Validity—Mutuality of Consideration—Agreement to Divide Benefits to be Received under a Will.*—A contract made during the lifetime of a testator by persons expecting to derive benefits from his will to divide any such benefits among them, is good if fairly obtained, and if it amounts only to an agreement to abstain from influencing the testator, and if there is mutuality of consideration.—*Higgins v. Hill*, 56 L.T. 426.

See Domicile, p. 98, vi.

Conversion:—

- (vi.) **Q. B.**—*Auctioneer.*—An auctioneer who in the course of his business sells goods apparently belonging to A., but really belonging to B., and without notice pays the proceeds to A., is not guilty of a conversion, and is not liable to B.—*Turner v. Hockey*, 56 L.J. Q.B. 301.

Copyhold:—

- (vii.) **C. A.**—*Admittance—Fines—Equitable Title.*—Decision of Ch. D. (*see Vol. 12*, p. 61, ii.) affirmed.—*Hall v. Bromley*, 56 L.T. 683; 35 W.R. 659.

Copyright :—

- (i.) **Ch. D.**—*Objection to the Registration—Practice—First Publication—Misstatement—Copyright Act, 1842, s. 16.*—In an action for infringement of copyright an objection by the defendant to the validity of the plaintiff's registration is not sufficiently raised by an affidavit of the defendant filed before the statement of claim on a motion for injunction. Defendant allowed to amend his pleadings so as to raise the objection on terms of allowing the plaintiff to prove a second registration since action brought, and raising no objection to the validity of such registration. The date of the publication of an illustrated catalogue, being a reprint with additions of previous catalogues duly registered, is the correct date of the first publication of the new matter. The description in the catalogue as "patent" of articles of which the patent had expired, does not take away the plaintiff's copyright in the part of the catalogue which contained correct statements.—*Hayward Brothers v. Lely & Co.*, 56 L.T. 418.
- (ii.) **Q. B. D.**—*Pictures—Copies Made before Registration—Sale after Registration—Copyright Act, 1862.*—The Copyright Act, 1862, applies only to statutory copyright, and gives no remedy for the infringement of the common law right of property in works of art, which exists before publication. The plaintiffs employed the defendant to produce copies of a drawing in which the plaintiffs had the copyright. The defendant made and imported other copies before the plaintiffs registered their copyright, which he sold after registration. *Held*, that the plaintiffs could not recover in respect of anything done before registration, and that the sale after registration of copies made and imported before registration gave no right of action.—*Tuck & Sons v. Priester*, L.R. 19 Q.B.D. 48.

Corporation.—*See Negligence*, p. 107, iii.

Costs :—

- (iii.) **Q. B. D.**—*Interpleader—Charges of Sheriff—County Courts Act, 1850, s. 14.*—In an interpleader proceeding on the application of the sheriff, the claimant, if successful, is entitled to recover as costs from the execution creditor the sheriff's charges subsequent to the interpleader order. The incidence of such charges is a matter of law and a proper subject of appeal from a County Court.—*Goodman v. Blake*, L.R. 19 Q.B.D. 77.
- (iv.) **C. A. & Q. B. D.**—*Parliament—Vexatious Opposition—28 & 29 Vict., c. 27, ss. 2, 3, 5.*—A committee of Parliament may not go behind a petition against a private bill, and award costs against a person who has, in fact, conducted the opposition, and vexatiously put the promoters to expense, when his name does not appear as a petitioner.—*Mallett v. Hanly and Fisher*, L.R. 18 Q.B.D. 787; 56 L.J. Q.B. 384; 56 L.T. 493; 35 W.R. 101.
- (v.) **Ch. D.**—*Sale with Approbation of Judge—Percentage Fees.*—On a sale by the Court of lands belonging to a company in liquidation, the purchase moneys of all the lands exceeded £200,000, and were paid in on a sale made under several orders of Court. *Held*, that the fees payable were the same as if the sale had been made under only one order.—*Re Oriental Bank Corporation*, 56 L.T. 731.
- (vi.) **Ch. D.**—*Taxation—Discretion of Taxing Master—Separate Sets of Costs—Refreshers—R.S.C., 1883, O. lxx., r. 27, sub-rr. 29, 48.*—The Taxing Master has discretion, which is not subject to review, to allow

separate sets of costs to defendants who appear separately. Where the trial of a witness case occupies four whole days and about three hours of a fifth, and at the request of the Judge it is re-heard on a single point on a sixth day, the re-hearing occupying substantially the whole day; *held*, that five refreshers should be allowed, although on the fifth day the case occupied less than five hours.—*Boswell v. Coaks*, 35 W.R. 711.

- (i.) **Q. B. D.**—*Treasury Prosecution by Local Solicitors—Liability to Account for Sums received as Costs.*—Where local solicitors are retained by the Treasury to conduct prosecutions, they are bound to account to the Treasury for sums received by them in respect of costs, and to pay to the Treasury the difference between such sums and the amount allowed on taxation.—*Reg. v. Gershon*, 56 L.T. 715.

See Company, p. 95, ii. *Restraint of Trade*, p. 115, vii.

Criminal Law :—

- (ii.) **P. C.**—*Appeal—Conviction Improperly Obtained.*—The Judicial Committee will not as a general rule review or interfere with the course of criminal proceedings in a Colonial Court; but where a legal practitioner was struck off the rolls of the Court upon a conviction for perjury after a charge by the Judge to the jury, which in the opinion of their lordships was "grievously unjust to the defendant, and in many instances outraged the proprieties of judicial procedure," the verdict and conviction were set aside.—*Re Dillet*, 56 L.T. 615.
- (iii.) **C. C. R.**—*Embezzlement—Appointment of Servant for Specific Purpose—Assistant Overseer*—59 Geo. III., c. 12, s. 7—24 & 25 Vict., c. 95, s. 68.—An assistant overseer, appointed by the inhabitants of a township, whose nomination did not specify as one of his duties the collecting or receiving of money, cannot be convicted for embezzling rates collected by him as a clerk or servant of the inhabitants.—*Reg. v. Coley*, 56 L.T. 747.
- (iv.) **Q. B. D.**—*Foreign Enlistment Act, 1870—Expedition Against Friendly State.*—The purchase of guns and ammunition in this country and their shipment for the purpose of being put on board a ship in a foreign port, with the knowledge of the purchaser and shipper that they are to be used in a hostile demonstration against a friendly State, is a fitting out and preparing an expedition against such State within the Queen's dominions, though the purchaser takes no part in any overt act of war, and the ship is not fully equipped in any port of the Queen's dominions.—*Reg. v. Sandoval*, 56 L.T. 526; 35 W.R. 500.
- (v.) **C. C. R.**—*Larceny—Automatic Box.*—An automatic box was fixed in a public place from which a cigarette could be obtained by dropping a penny into a slit. *Held*, that the prisoners, who obtained a cigarette by dropping into the slit a piece of metal of no value the size of a penny, were guilty of larceny.—*Reg. v. Hands*, 56 L.T. 370.
- (vi.) **C. C. R.**—*Larceny by Bailee—Fraudulent Conversion—Pledging Watches left for Repair—Evidence of Intent*—24 & 25 Vict., c. 26, s. 3.—Prisoner received two watches for repair and pledged them, on the first occasion stating that he only wanted the money temporarily, and on the second occasion asking the pledgee not to part with the watch as it was not his property: *Held*, that there was some evidence of fraudulent conversion, as the prisoner shewed no intention beyond the said statements of redeeming the watches.—*Reg. v. Wynn*, 56 L.T. 749.

- (i.) **C. C. R.**—*Perjury—Private Examination of Witness in Bankruptcy.*—A witness summoned for examination in bankruptcy was sworn before the registrar, but not examined before him or any person appointed by the Court: *Held*, that the examination was not taken before a Court of competent jurisdiction, and that a conviction for perjury therein committed could not be sustained.—*Reg. v. Lloyd*, 56 L.T. 750; 35 W.R. 653.
- (ii.) **C. C. R.**—*Sufficiency of Indictment—Obtaining Credit by False Pretences—Renewal of Bill of Exchange—Debtors Act, 1869.*—In an indictment for incurring a debt or liability whereby credit was obtained under false pretences or by means of fraud, it is not necessary to state the false pretences or fraud, it being sufficient to state the substance of the offence in the words of the Debtors Act, 1869, or as near thereto as circumstances admit. The renewal of a bill of exchange obtained by false pretences or by means of fraud is incurring a debt or liability whereby credit is obtained.—*Reg. v. Pierce*, 56 L.J. M.C. 85; 56 L.T. 532.

Damages :—

- (iii.) **Ch. D.**—*Measure of—Infringement of Patent.*—The measure of damages for infringement of a patent, where the plaintiff's practice has been to let out the patented article at a rental, is the profit rental of the article from the time when it came into the possession of the infringer till the assessment of damages, or its delivery up, though it has not been used all the time. The defendant may not set off the value of articles delivered up, nor an agreed sum recovered by the plaintiff from a person from whom the defendant bought the article; but the sum so recovered, if it represents the full profit rental, may be set off.—*United Telephone Co. v. Walker*, 56 L.T. 508.

Delay :—

- (iv.) **Ch. D.**—*Restrictive Covenant.*—A delay of fourteen months by a plaintiff in taking steps to prevent the continuance of a breach of a restrictive covenant will not amount to such acquiescence as to disentitle him to an injunction.—*Duke of Northumberland v. Bowman*, 56 L.T. 773.

Dilapidations :—

- (v.) **Ch. D.**—*Ecclesiastical Dilapidations Act, 1871, ss. 34, 36—Rank of "Debt."*—The claim against an incumbent's estate for ecclesiastical dilapidations, now ranks with those of other creditors.—*Wayman v. Monk; in re Monk*, 35 W.R. 691.

Domicile :—

- (vi.) **Ch. D.**—*Marriage of English Infant to Frenchman—Settlement—Capacity to Contract.*—An English infant married a domiciled Frenchman, and executed an antenuptial contract in the French form. *Held*, that it was not binding on her.—*In re Cooke's Estate*, 56 L.T. 737; 35 W.R. 608.

Easement :—

- (vii.) **Ch. D.**—*Implied Grant—Vendor and Purchaser—Light and Air.*—The owner of a house and vacant land adjoining contracted to sell the land without reserving the right to access of light and air to the windows of the house; before conveyance he sold the house; *held*, that no grant of light and air to the purchaser of the house could be implied.—*Beddington v. Atlee*, L.R. 35 Ch. D. 317; 56 L.T. 514.

Ecclesiastical Benefice :—

- (i.) **C. A.**—*Resignation—Validity—Acceptance.*—The execution before a notary public of a deed of resignation of a benefice is not essential to its validity if the Bishop dispenses with that formality. No writing, nor any particular form is requisite for the Bishop's acceptance; and if the resignation is sent at his request no acceptance is required. The resignation must not be conditional, but the Bishop may fix a future time at which the resignation, if accepted by him, shall come into actual operation by his declaring the benefice vacant. The resignation is not void because made at the request of the Bishop to avoid scandal and legal proceedings. If the Bishop, in accepting the resignation, agrees to postpone the declaration of the vacancy to enable the clerk to receive the next payment of tithe, this does not make the resignation invalid as being made for pecuniary consideration. A clerk may not withdraw his resignation before acceptance, if the position of any party has been changed in consequence of the tender of it: *e.g.*, if the Bishop has been induced to refrain from instituting proceedings for the deprivation of the clerk.—*Reichel v. Bishop of Oxford*, L.R. 35 Ch. D. 48; 56 L.T. 539.

Election (Parliamentary) :—

- (ii.) **Q. B. D.**—*Costs of Returning Officer—Ballot Act, 1872—38 & 39 Vict., c. 84, ss. 2, 4, 5.*—A service rendered by the returning officer may be chargeable against a candidate if it is of one of the kinds mentioned in the schedule to the Election Expenses Act, 1875: *e.g.*, a charge for keeping old ballot boxes from one election to another. Charges made by the under-sheriff are not to be disallowed merely because he has not sent in a detailed account within fourteen days. A County Court Judge may allow a sum charged under a wrong heading.—*In re Essex Election*, 56 L.J. Q.B. 357.
- (iii.) **Q. B. D.**—*Returning Officer's Charges.*—A returning officer at a parliamentary election is not entitled to remuneration for personal services rendered by him in the conduct of the election, under the heading of professional or other assistance, which he has not, in fact, employed.—*Re Shoreditch Election*; *e.p. Walker*, 56 L.T. 529.

Executor :—

- (iv.) **C. A.**—*Carrying on Trade of Deceased—Goods Bought—Right of Vendor.*—Where the personal representative of a deceased trader carries on his trade, and purchases goods for the purpose, the goods as between the vendor and the personal representative belong to the latter, who is a debtor to the vendor for the price of the goods; as between the personal representative and the estate they belong to the estate, subject to the right of the representative to be indemnified for the price if he is not a debtor to the estate. Consequently the vendor, being unpaid, can have no higher right than the personal representative, and is at the utmost entitled to a lien on his beneficial interest in the estate.—*Re Evans*; *Evans v. Evans*, L.R. 34 Ch. D. 597; 56 L.T. 768; 35 W.R. 586.
- (v.) **C. A.**—*Services Rendered to Estate before Constitution of Personal Representative—Ratification.*—Decision of Q. B. D. (*see* Vol. 12, p. 32, ii.) affirmed.—*E. p. Phillips*; *in re Watson*, 35 W.R. 709.
- (vi.) **Q. B. D.**—*Survival of Action—Libel—Slander of Title—R. S. C., 1883, O. xvii., rr. 1, 2.*—An action for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade-mark comes to an end on the death of the plaintiff so far only as it is an action for libel, but survives so far as it is an action for slander

of title, and the plaintiff's personal representative can recover on proof of special damage.—*Hatchard v. Mège*, L.R. 18 Q.B.D. 771; 56 L.J. Q.B. 397; 56 L.T. 662.

See Practice, p. 114, ii.

Fishery (Salmon):—

- (i.) **Q. B. D.**—*Power of Water-Bailiff*.—A water-bailiff, appointed under the Salmon Fishery Acts, 1865 & 1873 (28 & 29 Vict., c. 121, and 36 & 37 Vict., c. 71), is bound, before attempting to exercise his power of searching boats, &c., used in fishing, to produce the instrument of his appointment.—*Barnacott v. Passmore*, L.R. 19 Q.B.D. 75.

Friendly Society:—

- (ii.) **Ch. D.**—*Disputes—Friendly Societies Act, 1875—Certiorari*.—In a proper case, an action brought against a friendly society by one of its members, may be removed from the County Court into the High Court by certiorari.—*In re Royal Liver Friendly Society*, L.R. 35 Ch. D. 332.
- (iii.) **Q. B. D.**—*Dispute between Society and Member—County Court Judge—Jurisdiction—Friendly Societies Act, 1876, ss. 21, sub-s. 2, 22 (d); Friendly Societies Amendment Act, 1876, s. 6*.—A member of a branch of a friendly society, having been struck off the pension-list of the branch, for alleged infringement of the rules, duly appealed to the court provided by the rules of the society; no decision having been given within forty days, he sued, in the County Court, the secretary of the branch who issued policies and received subscriptions. *Held*, that the County Court Judge had jurisdiction to give the decision which the society's court of appeal should have given, and that the proper parties were before the Court.—*Reg. v. Northampton Judge*, 35 W.R. 717.
- (iv.) **Q. B. D.**—*Sick Pay—Right to*.—The rules of a friendly society provided that members falling sick, lame, or blind, or otherwise disabled from work, should receive a weekly payment from the society. *Held*, that a member who was certified by the surgeon to the society to be unable to work, "by reason of natural decay," was not entitled to sick pay.—*Dunkley v. Harrison*, 56 L.T. 660.

Highway:—

- (v.) **Q. B. D.**—*Metropolitan Area—Obstruction—Prosecution—Highway Act, (5 & 6 Will. IV., c. 50) s. 72*.—The provisions of section 72 of the Highway Act are applicable to highways within the Metropolitan area. A prosecution for an obstruction may be initiated by anyone.—*Back v. Holmes*, 56 L.T. 713.

Husband and Wife:—

- (vi.) **P. D.**—*Divorce—Permanent Maintenance—Reversionary Interests*.—In allotting permanent maintenance the Court will not interfere with reversionary interests except under special circumstances, where for instance it would be otherwise impossible to secure a provision for the wife.—*Harrison v. Harrison*, L.R. 12 P.D. 130; 56 L.J. P. 76; 35 W.R. 703.
- (vii.) **Q. B. D.**—*Judicial Separation—Order of Justices—Resumption of Cohabitation—Matrimonial Causes Act, 1878, s. 4*.—An order of justices, made on the conviction of a husband for an aggravated assault on his wife, that the wife should not be bound to cohabit with her husband, and that he should pay her a weekly sum for maintenance, is annulled by a resumption of cohabitation.—*Haddon v. Haddon*, L.R. 18 Q.B.D. 778; 56 L.J. M.C. 69; 56 L.T. 716.

- (i.) **P. D.**—*Restitution of Conjugal Rights—Deed of Separation—Covenant not to Sue—Non-appearance of Respondent.*—Where the husband, respondent to a suit for restitution of conjugal rights, had not fulfilled his covenant in a deed of separation to pay the wife an allowance, and did not appear in the suit, the Court granted a decree of restitution, notwithstanding a covenant in the deed by the wife not to take any proceedings to compel the husband to cohabit with her.—*Tress v. Tress*, L.R. 12 P.D. 128; 35 W.R. 672.

Income Tax:—

- (ii.) **C. A.**—5 & 6 Vict., c. 35, s. 60, r. 6.—*Public School.*—Decision of Q. B. D. (see Vol. 12, p. 33, iii.), affirmed.—*Blake v. Lord Mayor of London*, L.R. 19 Q.B.D. 79.

Infant:—

- (iii.) **Ch. D.**—*Bailiff for Infant—Account—Guardian by Nurture—Change of Right.*—The owner of a public-house and cottages devised them to his widow during widowhood, with remainder to his infant children. The widow married again but continued to reside in and manage the public-house, and she received the rents of the cottages and maintained the children. One of the children married while an infant. In an action by her and her husband, after she attained twenty-one, against her mother for one-fourth of the rents and profits; held (1) that the mother was in possession as bailiff for her infant children, and not as guardian by nurture, nor as a trespasser; (2) that the character of the possession did not change on the daughter's marriage or (3) on her attaining twenty-one; (4) that the mother was liable to account, as a trustee, for the rents and profits.—*Wall v. Stanwick*, L.R. 34 Ch. D. 763; 56 L.J. Ch. 501; 56 L.T. 309; 35 W.R. 701.
- (iv.) **Ch. D.**—*Infants Settlement Act, 1885—Marriage under Seventeen—Post-nuptial Settlement.*—A female, who was married under the age of seventeen, may, after attaining that age, and with the sanction of the Court, make a settlement of her property.—*In re Phillips*, 56 L.J. Ch. 337.

Injunction:—

- (v.) **Ch. D.**—*Exercise of Legal Power—Mala Fides.*—In the absence of proof of *mala fides* the exercise of a legal power will not be restrained on the ground of inconvenience to another party.—*James v. Lovel*, 56 L.T. 739; 35 W.R. 626.

Insurance:—

- (vi.) **Q. B. D.**—*Accident—Conditions—Notice of Death—United Kingdom—Jersey.*—Jersey is included within the United Kingdom in an insurance against accidents within the United Kingdom. Where a condition, indorsed on a policy, that notice of death should be given within seven days, is not clearly stated to be a condition precedent to payment, it cannot be treated as such.—*Stoneham v. Ocean Assurance Society*, 35 W.R. 716.

Intoxicating Liquor:—

- (vii.) **Q. B. D.**—*Sale in Measure—Licensing Act, 1872, s. 8.*—A publican drawing beer into a measure properly marked according to the imperial standard, and pouring it into an unmarked jug for delivery to a customer, who from his position could not see the marked measure, and was not aware of its use, is properly convicted of selling beer otherwise than in a measure marked according to the imperial standard.—*Addy v. Blake*, 56 L.T. 711; 35 W.R. 719.

Lands Clauses Act:—

- (i.) **Ch. D.**—*Waterworks Company—Payment into Court—Payment Out.*—The purchase-money of land taken compulsorily from a waterworks company which has no power of sale is properly paid into Court, and may be paid out to the company, there being no necessity for reinvestment in land.—*Re The Chelsea Waterworks Company*, 56 L.T. 421.

Landlord and Tenant:—

- (ii.) **C. A.**—*Covenant to Repair—Alteration in Value of Premises—Indemnity against Covenant—Bankruptcy.*—The fact that premises have deteriorated in value is no ground for diminishing the measure of damages for breach of a covenant to repair. The liability of the assignee of a lease to indemnify the assignor against the covenants in the lease is a future and contingent liability which may be proved in the bankruptcy of the assignee, and is therefore put an end to by his discharge. Decision of Q.B.D. (see Vol. 12, p. 33, vii.) partly affirmed and partly reversed.—*Morgan v. Hardy*, L.R. 18 Q.B.D. 646; 56 L.J. Q.B. 363; 35 W.R. 588.
- (iii.) **Ch. D.**—*Restrictive Covenant—Practice—Third Party Procedure—Indemnity—R.S.C., O. xvi., rr. 48, 52, 55.*—The lessee under a lease which contained a covenant against the use of the premises for any business, sublet with express permission to the sub-lessee to use the premises for a business, the sub-lessee having constructive notice of the lease, but no personal notice of the restrictive covenant. *Held*, that the lessor was entitled to damages against the lessee and an injunction against the sub-lessee. The sub-lessee having served a third party notice on the lessee, *held*, that the case was not one for contribution or indemnity, and that he could have no relief against his co-defendant, having failed to take out a summons for directions.—*Tritton v. Bankart*, 56 L.T. 306; 35 W.R. 474.
- (iv.) **H. L.**—*Scotch Law—Joint Tenants—Covenant to Pay Rent—Liability of Executors of Deceased Tenant.*—A lease was granted to L. and M. "and the survivor of them." L. and M. bound themselves and their respective heirs, executors and successors to pay the rent, all conjunctly and severally renouncing the benefit of discussion; and the lease provided that if L. or M. became bankrupt it should, in the option of the lessor, become void. L. became bankrupt, and M. died; the lessor did not exercise his option: *Held*, that M.'s representatives remained liable for rent though they had no interest in the lease.—*Burns v. Bryan*, L.R. 12 App. Cas. 184.
- See Bill of Sale*, p. 91, iii.

Licensing:—

- (v.) **Q. B. D.**—*Renewal of License—House Not Open—Discretion of Justices—Licensing Act, 1872, s. 42—Licensing Act, 1874, s. 26.*—The renewal of a license was objected to on the ground that the house was not kept open for the sale of excisable liquors. The house had been closed till after service of the notice of objection, but was open as a fact at the date of the hearing. *Held*, that the objection was good, and that the Justices had discretion to treat it as valid. *Held*, also, that the objection was not a personal one requiring the attendance of the holder of the license.—*Griffiths v. Justices of Lancaster*, 35 W.R. 732.
- (vi.) **Q. B. D.**—*Application by New Tenant—Renewal—Licensing Act, 1874, s. 32.*—After the expiration of a license, the renewal of which had been refused, and after the determination of the tenancy of its holder, the

new tenant applied for a license; *held*, that the application should have been treated as an application for a renewal, and that the Justices had no power to refuse it on mere discretionary grounds.—*Reg. v. Licensing Justices of Market Bosworth*, 35 W.R. 734.

Limitations :—

- (i.) **C. A.**—*Possession of Tenants—Receipt of Rent by Agent*—3 & 4 Will. IV., c. 27, ss. 8, 34—37 & 38 Vict., c. 57, s. 1.—In an action to recover land by the plaintiff as assignee of the heir of Y., the owner in fee, who had died intestate, it appeared that after Y.'s death the defendant, who had been his agent, continued to receive the rents, stating that he was acting on behalf of the true heir-at-law, and that he was ready to account to the heir when ascertained. It did not appear that these statements were communicated to the heir, or that the plaintiff in any way acted on the faith of them: *Held*, that the heir was not "in possession" by his tenant so as to prevent the statute running at the end of the first period of the tenancy. *Held*, also, that it was not shewn that the defendant was acting in the name of the heir or rightful owner; and that the heir could not, after the end of the statutory period, ratify the acts of the defendant so as to make his receipt of the rents the receipts of the heir.—*Lyell v. Kennedy*, L.R. 18 Q.B.D. 796; 56 L.J. Q.B. 303; 56 L.T. 647; 35 W.R. 725.
- (ii.) **Ch. D.**—*Statute 3 & 4 Will. IV., c. 27, s. 40—Payment—Same Hand to Pay and Receive—Trustees*.—Where the duty to pay and the right to receive rents out of which the interest of a charge ought to be paid are vested in different persons on trust for the same beneficiary, section 40 of the Statute of Limitations does not apply.—*Topham v. Booth*, 35 W.R. 715.

See Mortgage, p. 106, v.

Local Government :—

- (iii.) **Ch. D.**—*Public Nuisance—Action by Local Board—Public Health Act, 1875, s. 107*.—Proceedings by a local board to abate a public nuisance must be by way of information.—*Wallasey Local Board v. Gracey*, 35 W.R. 694.
- (iv.) **Q. B. D.**—*Paving New Street—Metropolis Local Management Act, 1855, s. 105—Metropolis Local Management Act, 1862, s. 77*.—A metropolitan local authority cannot, after having paved a new street at the cost of the general rates, renew the pavement of the same street at the expense of the adjoining owners.—*St. Giles, Camberwell v. Hunt*, 56 L.J. M.C. 65.
- (v.) **C. A.**—*Expenses of Paving—Dismissal of Summons—Fresh Apportionment—Public Health Act, 1875, ss. 150, 257*.—Decision of Q. B. D. (*see* Vol. 12, p. 66, ii.) affirmed.—*Mayor of Manchester v. Hampson*, 35 W.R. 591.
- (vi.) **C. A.**—*Improvement Commissioners—Urban Sanitary Authority—Act of 1875, ss. 5, 10, 12, 264, 341*.—Decision of Q. B. D. (*see* Vol. 11, p. 128, v.) affirmed.—*Lea v. Facey*, 35 W.R. 721.

Lunatic :—

- (vii.) **H. L.**—*Order for Detention—Order of Discharge*—8 & 9 Vict., c. 100, ss. 72, 99—16 & 17 Vict., c. 76, s. 4; Sched. A, No. 1.—Decision of C. A. (*see* Vol. 11, p. 46, i.) affirmed.—*Lowe v. Fox*, L.R. 12 App. Cas. 206; 56 L.T. 406.

- (i.) **C. A.**—*Sale of Property—Form of Order—Lunacy Regulation Act, 1853*, ss. 116, 136—*Trustee Act, 1850*, s. 3.—Where part of a lunatic's property consisted of a mortgage with power of sale; held, that the usual practice, viz., to order a sale, and by a second order to vest the property in the purchaser, should be followed.—*Re Harwood*, 56 L.T. 502.
- (ii.) **Ch. D.**—*Person of Unsound Mind not so found—Maintenance.*—The Court has no jurisdiction to direct the application of the property of a person of unsound mind, not so found, for his maintenance, unless there is money belonging to him in Court, or the Court has control over his property by reason of there being an action or some other proceeding pending relating to the property.—*In re Grimmett's Trusts*, 56 L.J. Ch. 419.

See Mortgage, p. 105, ix.

Married Woman:—

- (iii.) **Ch. D.**—*Bequest for Erection of Church—43 Geo. III., c. 108—Married Women's Property Act, 1882.*—The disability of a married woman, acting without her husband, to make a bequest for erecting a church, is not removed by the Married Women's Property Act, 1882.—*Re Smith; Clements v. Ward*, 35 W.R. 514.
- (iv.) **Ch. D.**—*Restraint on Anticipation—Conveyancing Act, 1881*, s. 39.—The Court relieved a part of the income of a married woman from the restraint on anticipation, to enable her to raise money to discharge liabilities which she had incurred to her husband's creditors, her husband being a bankrupt and without means, and the evidence shewing that she was suffering in health from anxiety caused by her pecuniary embarrassment.—*Re C.'s Settlement*, 56 L.J. Ch. 556; 56 L.T. 299.
- (v.) **C. A.**—*Restraint on Anticipation—Liability of Married Woman not Arising from Contract.*—Where a fund was under an order of Court paid to a married woman, and the order was afterwards reversed, and the married woman ordered to refund, and the fund declared by the Court of Appeal to be subject to a settlement on the married woman for life without power of anticipation, an arrear of income which had accrued up to the date of the order to refund, was directed to be retained in part satisfaction of the order to refund.—*Re Dizon; Dizon v. Smith*, L.R. 35 Ch. D. 4.
- (vi.) **Q. B. D.**—*Separate Estate—Post-Nuptial Settlement—Restraint on Anticipation—Contract by Wife During Coverture—Married Women's Property Act, 1882*, ss. 1, 5, 19.—By a post-nuptial settlement made before the Married Women's Property Act, 1882, property devised by will to a married woman for her separate use was limited to her for life for her separate use without power of anticipation, remainder to her husband for life, remainder to the children. The wife after the Act and during coverture made a promissory note in favour of the plaintiffs, and after the death of the husband the plaintiffs obtained judgment upon the note against the widow and an order for a receiver of the rents and profits of the property in settlement. Held, that the settled property was not liable to satisfy the judgment, and that the order for a receiver must be discharged.—*Beckett v. Tasker*, L.R. 19 Q.B.D. 7; 56 L.T. 636.
- (vii.) **C. A.**—*Separate Estate—Simple Contract Debt—Statute of Limitations.*—Decision of Ch. D. (see Vol. 12, p. 35, v.) affirmed.—*Re Hastings; Hallett v. Hastings*, L.R. 35 Ch. D. 94; 35 W.R. 584.

See Bankruptcy, p. 89, v. & vi.

Master and Servant:—

- (i.) **Q. B. D.**—*Tramcar Driver—Employers and Workmen Act, 1875, s. 10—Employers Liability Act, 1880, s. 8.*—A tramcar driver is not a workman within the meaning of the Employers Liability Act, 1880, nor entitled to the benefit of that Act.—*Cook v. North Metropolitan Tramway Company*, L.R. 18 Q.B.D. 683; 56 L.J. Q.B. 309; 56 L.T. 448; 35 W.R. 577.
- (ii.) **C. A.**—*Defect in Works—Volenti non fit injuria—Employers Liability Act, 1880, s. 1, sub-s. 1.*—Decision of Q.B.D. (see Vol. 12, p. 11, ii.) affirmed.—*Thomas v. Quartermaine*, L.R. 18 Q.B.D. 685; 56 L.J. Q.B. 340; 35 W.R. 555.

Medical Practitioner:—

- (iii.) **Q. B. D.**—*Services Rendered by Unqualified Assistant—Right to sue—Medical Act, 1858, s. 32.*—A duly qualified and registered medical practitioner cannot sue for services wholly rendered by an unqualified and unregistered assistant.—*Howarth v. Brearley*, 56 L.T. 743.

Mines:—

- (iv.) **C. A.**—*Inclosure—Rights of Lord of Manor—Granite.*—By an Inclosure Act an allotment was made to the Crown as lord of the manor in respect of his rights in the soil. The Act contained a proviso reserving the Crown rights to any "mines, ores, minerals, coal, limestone, or slate." Held, that granite was reserved and that the Crown could win it by open workings.—*A.-G. v. Welsh Granite Co.*, 35 W.R. 617.

Mortgage:—

- (v.) **Ch. D.**—*Arrears of Interest—Limitations—3 & 4 Will. IV., c. 27, s. 42; 37 & 38 Vict., c. 57, s. 10.*—A mortgagee is entitled to retain, out of moneys in his hands arising from the exercise of his power of sale, more than six years' arrears of interest.—*Marshfield v. Hutchings*, L.R. 34 Ch. D. 721; 56 L.T. 694; 35 W.R. 491.
- (vi.) **C. A.**—*Deposit of Title Deeds.*—Decision of Q. B. D. (see Vol. 12, p. 68, ii.) affirmed.—*E. p. Broderick; re Beetham*, L.R. 18 Q.B.D. 766; 56 L.J. Q.B. 353; 35 W.R. 613.
- (vii.) **C. A.**—*Equitable Mortgage—Power to Convey—Conveyancing Act, 1881, s. 21.*—An equitable mortgage by a deed which incorporates the powers conferred by the Conveyancing Act, 1881, on mortgagees by deed, does not enable the mortgagee on exercising his power of sale to convey the legal estate to the purchaser.—*In re Hodson and Howe*, 35 W.R. 553.
- (viii.) **Ch. D.**—*Foreclosure—Rents Received after Certificate—Enlargement of Time.*—On motion for foreclosure absolute, when the mortgagees had received rents since the date of the certificate, the mortgagor not appearing, ordered, that the time should be enlarged one month, that the mortgagees should file an affidavit shewing what would then be due, and foreclosure absolute in default of payment.—*Lacon v. Tyrrell*, 56 L.T. 483.
- (ix.) **C. A.**—*Mortgages of Unsound Mind—Appointment of Person to Convey—Trustee Act, 1850, s. 3.*—Where a mortgagee is of unsound mind, the Court can appoint a person to convey the estate for the purpose of effecting a transfer of the mortgage.—*Re Nicholson*, L.R. 34 Ch. D. 663; 56 L.T. 770; 35 W.R. 569.

- (i.) **Ch. D.—Mortgagor in Occupation—Receiver—Occupation Rent.**—A receiver appointed in a foreclosure action against a mortgagor who was in occupation of part of the mortgaged property, having demanded from the mortgagor an occupation rent; *held*, that the rent was payable from the time of the demand.—*The Yorkshire Banking Company v. Mallan*, L.R. 35 Ch. D. 125; 56 L.J. Ch. 562; 56 L.T. 399; 35 W.R. 593.
- (ii.) **Ch. D.—Power of Sale—Interest on Surplus Proceeds—Inquiries—Costs.**—A mortgagee in possession having sold and being sued for an account, paid a sum into Court which he stated was the amount due from him. The Chief Clerk's certificate found that a large further sum was due. *Held*, that the mortgagee must pay interest on both sums, from the completion of the sale till payment into Court, and that he could have no costs of the inquiries.—*Charles v. Jones*, 35 W.R. 645.
- (iii.) **Ch. D.—Power of Sale—Notice.**—The power of sale in a mortgage deed, which requires that, before exercise, notice requiring payment of the money secured should be given, and that three months' default should be made, and which makes a sale valid in favour of a purchaser, notwithstanding any impropriety or irregularity, does not enable the mortgagee to sell, unless he has given his notice requiring payment after the date at which the money is made payable by the deed, and there has been three months' default in complying with such notice, and does not make the sale good in favour of a purchaser who bought with knowledge that the notice had not been given.—*Selwyn v. Garfit*, 56 L.T. 699.
- (iv.) **Ch. D.—Indorsed Receipt—Sub-Mortgage—Notice.**—Where a receipt for the consideration was indorsed on a mortgage-deed but no money was paid to the mortgagor, a person who, without notice of the circumstances, advanced money to the mortgagee on the security of the deposit of the deed, is entitled to hold it against the mortgagor.—*French v. Hope*, 56 L.J. Ch. 363.
- (v.) **Ch. D.—Joint Account Clause—Tenancy in Common.**—Mortgages, including joint-account clauses, were taken in the names of three persons. It being proved that the mortgage money was part of the estate of a deceased person to which the mortgagees were entitled as tenants in common; *held*, that, notwithstanding the joint-account clauses, the mortgagees were entitled to the mortgage money as tenants in common.—*Re Jackson; Smith v. Sibthorpe*, L.R. 34 Ch. D. 782; 56 L.J. Ch. 593; 56 L.T. 562; 35 W.R. 646.

See Practice, p. 109, vi.

Mortmain :—

- (vi.) **Ch. D.—Lease of Site for Workhouse—Charitable Use—Want of Inrolment—Limitations—9 Geo. I., c. 7, s. 4.**—A lease was granted at a nominal rent, from a future day, to several persons, including the vicar of the parish, as a site for a workhouse; the land was not to be let or sold, but might be given up to the lessor on his paying for the building. *Held*, that the lease was for charitable uses, that it was void, as it did not take effect in possession, and there was a reservation in favour of the grantor, and that therefore the Statute of Limitations barred the lessor's representative in an action for rent.—*Webster v. Southey*, 35 W.R. 622.

Municipal Corporation :—

- (i.) **Q. B. D.**—*Application of Borough Fund—Poll—Register of Owners and Proxies—The Municipal Corporations (Borough Funds) Act, 1872, s. 4—The Public Health Act, 1875, Sched. II., r. 19.*—The Town Council of a borough is not bound to keep a register of owners and proxies for the purpose of taking a poll with respect to the application of the borough funds in opposing a local and personal bill in Parliament.—*Ward v. Mayor, &c., of Sheffield*, L.R. 19 Q.B.D. 22.

Naval Officer :—

- (ii.) **Q. B. D.**—*Right to resign Commission—Arrest of Offender—Naval Discipline Act, 1866—Admiralty Regulations, Art. 160.*—A commissioned officer in the Royal Navy who has accepted an appointment on one of Her Majesty's ships in commission, and is entered on the ship's books, may not without permission from the Admiralty resign his commission and leave his ship. Such an officer does not by resigning his commission without permission from the Admiralty cease to be "a person belonging to Her Majesty's Navy" within section 87 of the Naval Discipline Act, 1866. An offender against the Act may be arrested by a naval officer being "a person subject to the Act" within the meaning of section 51, without the warrant mentioned in section 50.—*Reg. v. Cumming*; *s. p. Hall*, L.R. 19 Q.B.D. 13; 56 L.J. Q.B. 287.

Negligence :—

- (iii.) **Q. B. D.**—*Corporation—Custody of Seal—Fraudulent Transfer.*—A corporation, which by the negligent custody of its seal has permitted one of its officers to affix the seal to powers of attorney for the transfer of Government stock belonging to the corporation and to misappropriate the stock, may require the Bank of England to replace such stock.—*Merchants of the Staple v. Bank of England*, 56 L.T. 665.
- (iv.) **Q. B. D.**—*Quarry—Duty to Fence.*—A person working and enlarging a quarry situated in a field where another person's cattle are lawfully grazing is liable for injury to the cattle arising from the absence of a fence to the quarry.—*Hawken v. Shearer*, 56 L.J. Q.B. 284.

Partnership :—

- (v.) **C. A.**—*Seizure and Sale by Sheriff of Interest in a Partnership—Effect of.*—*Semble*, the sheriff cannot sell under an execution against a partner his interest in the goodwill of the business, or anything else which he cannot seize. *Semble*, the sale by the sheriff, though not the seizure, of the debtor's interest in a partnership effects a dissolution of the partnership, the sale being made to a stranger. But where the other partner purchased the interest of the debtor in the goodwill and assets which the sheriff purported to sell under an execution, and debited the purchase money in the accounts of the partnership to the debtor, *held*, that no dissolution was effected. *Quære*, as to the effect of a purchase by the other partner with his own money.—*Helmore v. Smith*, 56 L.T. 535.

Patent :—

- (vi.) **Ch. D.**—*Action for Infringement—Issue of Advertisements—Patents, Designs, and Trade Marks Act, 1883, s. 32.*—The plaintiff in an action for infringement of a patent may not, pending trial, issue advertisements stating that the defendant had infringed his patent.—*Gaulard and Gibbs v. Lindsay & Co.*, 56 L.T. 506.

- (i.) **Ch. D.**—*Communication from Abroad*—*Patents, Designs, and Trade Marks Act, 1883, ss. 5, 26, sub-s. 4 (c), (d), sub-s. 8, 35, 101, Sched. I, form A—Patent Rules, 1883, r. 27, Sched. II., form A 1.*—"Fraud" in section 26, sub-section 4 (c) of the Act of 1883 means moral fraud. Where an agent in England, acting under a power of attorney given by an inventor in America, took out a patent for the invention in his own name, and not as on a communication from abroad, and declared himself to be the true and first inventor; *held*, that a person in such a case might have honestly taken out the patent, and made the declaration, and that the patent was not obtained in fraud of the inventor's rights. Petition by the inventor for revocation of the patent dismissed, without prejudice to any petition he might present to be declared the true and first inventor.—*Re Avery's Patent*, 56 L.J. Ch. 586; 56 L.T. 324; 35 W.R. 541.
- (ii.) **C. A.**—*Practice—Particulars of Objection to Patent.*—If a defendant knows of a particular defect in a specification he ought to point it out. An objection that the specification does not contain sufficient direction to enable a skilled workman to make the patented article is not sufficient.—*Crompton v. Anglo-American Brush Electric Light Corporation*, L.R. 35 Ch. D. 283.
- (iii.) **C. A.**—*Novelty—Foreign Specifications in Public Library.*—Where the specifications, in a foreign language, of a foreign patent have been deposited in a public library and have been accessible to the public, the English patentee of the article described in the specifications must, to support the validity of his patent, shew that such specifications were not seen by anyone who understood the language, even if the deposit of the foreign specifications was not in itself a sufficient prior publication to avoid the patent.—*Harris v. Rothwell*, 56 L.J. Ch. 459; 56 L.T. 552; 35 W.R. 581.
- (iv.) **C. A.**—*Validity—Provisional and Complete Specifications—Patents, Designs, and Trade Marks Act, 1883, s. 5, sub-ss. 3, 4.*—A patentee need not in his provisional specification describe any method of carrying out his invention; but if he does so, he may describe in his complete specification a further or different method of carrying it out, provided such new method is fairly within the invention as described in the provisional specification.—*Woodward v. Sansum*, 56 L.T. 347.

Poor Law:—

- (v.) **C. A.**—*Rateable Value—Hypothetical Yearly Tenant.*—Decision of Q. B. D. (*see* Vol. 12, p. 38, ii.) affirmed.—*Owens College v. Overseers of Chorlton-upon-Medlock*, 56 L.T. 378.
- (vi.) **Q. B. D.**—*Rating—Assessment Committee—Provisional List—Valuation (Metropolis) Act, 1869, ss. 46, 47.*—In order to render a provisional list necessary, it is sufficient to shew an alteration in the value of the hereditaments to be inserted in such list, without any structural alteration, and the assessment committee will be ordered by mandamus to appoint a person to make a provisional list if a *prima facie* case of alteration in value is made out.—*Reg. v. St. Mary, Islington*, 35 W.R. 664.
- (vii.) **C. A. & Q. B. D.**—*Rating—Greenhouses—Market Gardens or Nursery Grounds—Public Health Act, 1875, s. 211, sub-s. 1 (b).*—A piece of land with greenhouses erected on it which substantially cover the land, and are used to grow vegetables, fruit and flowers for market, is to be assessed at one-fourth of the net annual value as a "market garden or nursery ground."—*Purser v. Local Board of Health for Worthing*, L.R. 18 Q.B.D. 818; 56 L.J. M.C. 78; 56 L.T. 447; 35 W.R. 519 & 682.

- (i.) **C. A.—Rating—Line Leased by Railway Companies.**—A line built by a railway company, was by an agreement with three other companies leased to them in perpetuity at an annual rent, and they were empowered to use it without payment of tolls; there was power for the lessees to let the line with consent of the lessors; the agreement was confirmed by Act of Parliament. *Held*, that the rateable value of the line was not to be ascertained as if it were an integral portion of the lines of the leasing companies, but was to be based on the rent which a tenant from year to year might be expected to give for it as an independent line.—*North & South-Western Junction Ry. Co. v. Brentford Union*, L.R. 18 Q.B.D. 740; 35 W.R. 640.
- (ii.) **Q. B. D.—Rating—Reformatory—Industrial Schools—Reformatory Schools Act, 1866.**—A reformatory school is rateable on a par with industrial schools.—*Tunncliffe v. Birkdale Overseers*, 35 W.R. 731.
- (iii.) **C. A. & Q. B. D.—Tithes in London—Commutation—Rateability—37 Hen. VIII., c. 12—43 Eliz., c. 2.**—The annual sum paid under 44 & 45 Vict., c. xciv., in lieu of the rate previously paid on the houses in the parish of St. Botolph Without is not rateable to the poor rate.—*Esdale v. Assessment Committee of the City of London*, L.R. 18 Q.B.D. 599; 56 L.J. M.C. 60; 56 L.T. 523; 35 W.R. 497 & 722.

Power of Appointment :—

- (iv.) **Ch. D.—Excessive Exercise—Attempted Delegation—Appointment in Default of Exercise of Delegated Power.**—The donee of a power to appoint to his children appointed to the children of his son as the son should appoint, and in default of such appointment to his son absolutely. The son died without exercising the delegated power. *Held*, that the ultimate limitation in favour of the son took effect.—*Williamson v. Farwell*, L.R. 35 Ch. D. 128.

Power of Leasing :—

- (v.) **Ch. D.—Best Rent—Covenant for Renewal.**—A lease granted under a leasing power which required that the best rent obtainable should be reserved may contain a covenant for renewal, but on renewal the best rent obtainable at the time must be reserved, and a covenant to renew at the old rent will not be enforced if such rent is not, at the time of renewal, the best rent obtainable.—*The Gas Light and Coke Co. v. Towse*, 56 L.T. 602.

Practice :—

- (vi.) **Ch. D.—Additional Relief asked by Statement of Claim—Non-appearance—R.S.C., O. xx., r. 24—Foreclosure—Action or Summons—R.S.C., O. lv., r. 5a.**—When a defendant does not appear the plaintiff cannot obtain any relief asked by his statement of claim beyond that asked by the endorsement on the writ. *Seems*, that the fact that a receiver is asked for is not sufficient reason for proceeding to obtain foreclosure by action instead of by summons.—*Gee v. Bell*, L.R. 35 Ch. D. 160; 56 L.T. 305.
- (vii.) **Ch. D.—Administration—Protection of Assets before Judgment.**—The plaintiff in a creditor's action for administration cannot have interim relief against the executor for protection of the assets unless there is a case shewn of the assets being wasted.—*Harris v. Harris*, 56 L.T. 507; 35 W.R. 710.

- (i.) **H. L.**—*Affidavit of Documents—Land—Privilege.*—Decision of C. A. (see Vol. 12, p. 13, iii.) affirmed.—*Ind, Coope & Co. v. Emmerson*, 56 L.T. 778.
- (ii.) **Ch. D.**—*Chambers—Order by Way of Final Judgment—Appeal.*—Where an order has been made in Chambers by way of final judgment against an executor, the Court will not give leave to appeal direct to the Court of Appeal, unless all parties have appeared in Chambers by counsel. The proper course is to move to discharge the order.—*Re Somerville; Downes v. Somerville*, 56 L.T. 424.
- (iii.) **Ch. D.**—*Contempt—Arrest after Compliance with Order.*—A writ of attachment having been issued against a party for contempt in not complying with an order to file an affidavit of documents, and the order having been complied with before arrest, enforcement of the writ ought to be stayed immediately by the solicitors of the party obtaining it.—*Gay v. Hancock*, 56 L.T. 726.
- (iv.) **P. D.**—*Contempt of Court—Divorce—Advertisements.*—It is contempt of Court for the co-respondent in a divorce suit, after service of the citation, to insert advertisements in the newspapers denying the allegations in the petition, and offering a reward for information concerning them.—*Brodrick v. Brodrick*, 56 L.T. 672.
- (v.) **Ch. D.**—*Correction—R.S.C., 1883, O. xxviii., r. 11—Ex parte Injunction.*—The Court can correct an order to commit for contempt by breach of an *ex parte* injunction, by adding an order for payment of the costs of the *ex parte* injunction.—*Blakey v. Hall*, 56 L.J. Ch. 568; 56 L.T. 400; 35 W.R. 592.
- (vi.) **Q. B. D.**—*Costs—Taxation—Evidence on.*—On a taxation between solicitor and client, where the client has denied the statements made in the solicitor's affidavit, the master ought to receive further evidence, and have the parties cross-examined.—*E. p. Brown; in re Evans*, 35 W.R. 546.
- (vii.) **C. A.**—*Costs—Shorthand Notes—Tazing Master—R.S.C., 1883, O. lrv. r. 25.*—Decision of Ch. D. (see Vol. 12, p. 72, viii.) affirmed.—*Re Hilleary and Taylor*, 35 W.R. 705.
- (viii.) **C. A.**—*Compulsory Reference—Common Law Procedure Act, 1854, s. 3—Judicature Act, 1873, s. 57.*—Where part of the matter in dispute in an action is matter of mere account, the whole of the action may be compulsorily referred.—*Knight v. Coales*, 35 W.R. 679.
- (ix.) **Q. B. D.**—*County Court—Administration—County Court Rules, 1886, O. vi., r. 6; O. xxii., r. 11.*—The granting in the County Court to a person interested in the estate of a deceased person of an order to administer such estate, is within the discretion of the judge.—*Pearson v. Pearson*, 56 L.T. 445.
- (x.) **Q. B. D.**—*County Court—Slander—County Courts Act, 1867, s. 10—Judicature Act, 1873, s. 67.*—Actions of libel and slander may still be remitted to the County Court on the plaintiff failing to give security for costs.—*Stokes v. Stokes*, 56 L.T. 712; 35 W.R. 613.
- (xi.) **Q. B. D.**—*County Court—Action Remitted for Trial—Reduction of Claim—30 & 31 Vict., c. 142, s. 7.*—An action may be remitted for trial to the County Court when the claim is reduced by payment or set-off to an amount not exceeding £50, though such payment or set-off is not admitted by the defendant, it appearing from the writ to be admitted by the plaintiff.—*Percival v. Padley*, L.R. 18 Q.B.D. 635; 35 W.R. 566.

- (i.) **Q. B. D.**—*County Court—Appeal—County Court Rules, 1886, O. xxxi.*—*County Courts Act, 1867, s. 13.*—There is no appeal, by leave or otherwise, from the order of a County Court Judge in an interlocutory proceeding.—*Jacobs v. Dawkes*, 35 W.R. 649.
- (ii.) **Q. B. D.**—*County Court—Jurisdiction—Deposit Note—Delivery of.*—The County Court can try an action for delivery up of a deposit note for over £50, as the value of the note to the plaintiff is merely the amount represented by the time and trouble he would be put to in proving his title to the money.—*Clegg v. Baretta*, 56 L.T. 775.
- (iii.) **Ch. D.**—*Defence Delivered out of Time and After Notice of Motion for Judgment—R.S.C., 1875, O. xxix., r. 10—R.S.C., 1883, O. xxvii., r. 11.*—Defence was delivered out of time and after notice of motion for judgment in default of pleading; defendants did not appear on motion. Held, that the defence could not be treated as a nullity. Judgment according to statement of claim, but not to be drawn up for a week; defendant to be at liberty to move to discharge the order for judgment within seven days.—*Montagu v. Land Corporation*, 56 L.T. 730.
- (iv.) **Ch. D.**—*Production of Documents—Privilege—Inaccurate Affidavit.*—Where the defendant in his affidavit in answer to a summons for production of documents inaccurately describes one of the documents for which he claims privilege, and which document he is ordered to produce, he does not thereby lose his privilege as to the other documents.—*Leslie v. Cave*, 56 L.T. 332; 35 W.R. 515.
- (v.) **Q. B. D.**—*Discovery—Common Informer—R.S.C., 1883, O. xxxi.*—In an action for penalties by a common informer, the plaintiff will not be allowed to call for discovery of documents.—*Whiteley v. Barley*, 56 L.J. Q.B. 312.
- (vi.) **C. A.**—*Discovery in Aid of Execution—Examination of Person other than Debtor—R.S.C., 1883, O. xlii., r. 32.*—There is no power when a judgment or order has been obtained for the payment of money, to make an order for the examination of any person other than the debtor liable under such judgment or order; or, in the case of a corporation, other than an officer of the defendant corporation.—*Irwell v. Eden*, L.R. 18 Q.B.D. 588; 56 L.T. 620; 35 W.R. 511.
- (vii.) **Ch. D.**—*Discovery—Production—Solicitor—Privilege.*—Documents are not privileged as communications between solicitor and client which passed between two co-defendants to an action to set aside a sale as a breach of trust, the two defendants having been trustees of the property sold, and one of them having acted as solicitor to the trustees, and also as private solicitor to the other defendant.—*Postlethwaite v. Rickman*, 56 L.T. 733; 35 W.R. 563.
- (viii.) **Q. B. D.**—*Discontinuance—Costs—Discretion—Delegation of—O. xxvi., r. 1.*—Upon an application by the plaintiff for leave to discontinue an action, the defendant cannot be made to pay any costs of a defence, which, if undisputed or found in the defendants' favour, would have disentitled the plaintiff from maintaining his action. The Court or a Judge cannot delegate a discretion as to costs expressly given.—*Lambton & Co. v. Parkinson & Co.*, 35 W.R. 545.
- (ix.) **Q. B. D.**—*Vivâ voce Evidence—County Court.*—The practice by which application to be allowed to give *vivâ voce* evidence must be made beforehand and not at the same time as the motion on which it is desired to use such evidence does not apply to County Courts.—*E. p. Wilkinson; in re Wilson*, 33 W.R. 668.

- (i.) **Ch. D.**—*Evidence de Bene Esse—Form of Order.*—The order to examine a witness *de bene esse* ought not to state that the depositions may be given in evidence at the trial. The incapacity of the witness must be shewn at the trial before leave is given to use the depositions.—*Burton v. North Staffordshire Ry. Co.*, 56 L.T. 601; 35 W.R. 536.
- (ii.) **P. D.**—*Evidence—Revocation of Probate—Attesting Witness not Found—Affidavit—R.S.C.*, 1883, O. xxxvii., r. 1.—In a suit for revocation of probate, where one of the attesting witnesses could not be found, his affidavit, made at the time of granting of probate eight years before, was admitted as evidence of the testator's capacity.—*Gornall v. Mason*, L.R. 12 P.D. 142; 35 W.R. 672.
- (iii.) **Ch. D.**—*Foreclosure—Possession—Form of Order—R.S.C.*, 1883, O. xviii., rr. 12, 13.—The minutes of the order in a foreclosure action, where possession is claimed, should contain an order for delivery of possession in case of default in redemption.—*Williamson v. Burrage*, 56 L.T. 702.
- (iv.) **Ch. D.**—*Fund in Court—Stop-Order—Application for—R.S.C.*, 1883, O. xlvii., rr. 12, 13.—Where a fund in Court, paid in under the Trustee Relief Act, 1847, exceeds £1,000, and there has been no prior application in the matter of the fund, a petition is the proper mode of applying for a stop-order.—*Re Toogood's Trusts*, 56 L.T. 703.
- (v.) **C. A. & Q. B. D.**—*Judgment Debt—Interest—County Court—1 & 2 Vict.*, c. 110, s. 17.—A County Court judgment debt does not carry interest.—*Reg. v. County Court Judge of Essex*, L.R. 18 Q.B.D. 638 & 704; 56 L.J. Q.B. 315; 35 W.R. 511.
- (vi.) **C. A.**—*Interpleader—Appeal—R.S.C.*, 1883, O. lvii., rr. 8, 11.—A summary decision by a judge in chambers, on an interpleader summons, is not subject to appeal, and there is no power to give leave to appeal.—*Lyon v. Morris*, L.R. 19 Q.B.D. 139.
- (vii.) **C. A.**—*Lis Alibi Pendens—Colonial Action—English Action—Counter-Claim.*—A. and B., residing in Honduras, were in partnership there with C., who resided in England; C. was also in partnership in England with D.; C. and D. were agents for the Honduras firm. C., in an action in Honduras obtained an order for accounts of the partnership against A. and B. A. and B., in an action in England against C. and D., claimed an account of dealings between the two firms. C. and D. by counter-claim claimed an account of all partnership dealings between A. B. and C. Held, that the counter-claim was not vexatious, though it would not follow that the accounts thereby claimed would be given except on terms of the result of the account in the Honduras action being accepted.—*Mutrie v. Binney*, 56 L.T. 455.
- (viii.) **C. A.**—*New Trustees—Vesting Order—Irish Railway Shares—Consent of Trustee—Trustee Act, 1850*, ss. 54, 56—*R.S.C.*, 1883, O. xxxviii., r. 19a.—When a petition is intituled both in Lunacy and in Chancery the Court may on appointing a new trustee make a vesting order of Irish railway shares. When a petition is so intituled the consent of the trustee to act is sufficiently verified by his solicitor's certificate.—*Re Hume*, 56 L.T. 351.
- (ix.) **Ch. D.**—*Originating Summons—New Trustees—R.S.C.*, 1883, O. lv., rr. 3, 4, 8.—On an originating summons for general administration of an estate and the appointment of new trustees, the Court can order the appointment of new trustees, all parties interested in the appointment being before the Court.—*Re Allen; Simes v. Simes*, 56 L.T. 611.

- (i.) **Ch. D.—Originating Summons—Defendant Claiming Against the Will.**—There is no jurisdiction to decide, on originating summons, questions between persons claiming under a will and persons claiming against it.—*Franks v. Worth*, 56 L.T. 726; 35 W.R. 663.
- (ii.) **Ch. D.—Particulars of Demand—Account—R.S.C., O. xix., r. 8.**—To a statement of claim alleging that all moneys due under a mortgage had been paid, and asking for delivery of the property, the mortgagee put in a counter-claim alleging that a balance was due to him, and asking for an account. *Held*, that the plaintiff was entitled to particulars of the moneys received by the defendant from which he arrived at the balance which he alleged was due.—*Kemp v. Goldberg*, 56 L.T. 736.
- (iii.) **Ch. D.—Parties—Mining Lease—Lessor.**—In an action by a copyholder to restrain the working of coal under his land by a lessee of the lord of the manor, the lord is a proper party, on the allegation that he claims the right by himself or his lessees to work the coal, and that he justifies the acts of the lessee.—*Shafto v. Bolckow, Vaughan & Co.*, L.R. 34 Ch. D. 725; 56 L.T. 608; 35 W.R. 562.
- (iv.) **C. A.—Pleading—Inconsistent Defence—Embarrassment.**—Inconsistent pleadings are allowed; a defendant may plead alternative statements of fact, and rely on such as he can prove. Action by administrator of a wife against the executor of her husband, for moneys alleged to have been received by the husband on trust for the separate use of the wife. Defence (1) denial of receipt; (2) denial of any trust if the moneys were received; (3) payment to wife; (4) a gift by her to her husband; (5) accord and satisfaction; (6) set-off; (7) the Statute of Limitations; (8) laches. *Held*, that none of the defences ought to be struck out, but that the defendant must amend or give particulars of the defences (4), (5), and (6) within 14 days of obtaining discovery.—*Re Morgan; Owen v. Morgan*, 56 L.J. Ch. 603; 56 L.T. 503; 35 W.R. 705.
- (v.) **Ch. D.—Service out of Jurisdiction—R.S.C., 1883, O. xi., r. 1 (c) and (g), r. 2.**—An action for administration of the will of a person who died domiciled in Ireland, having been properly commenced against one of the executors who was within the jurisdiction, it is within the discretion of the Court to allow service on the other executors who were in Ireland.—*Harvey v. Dougherty*, 56 L.T. 322.
- (vi.) **Q. B. D.—Service—Specially Indorsed Writ—R.S.C., 1883, O. xx., r. 1; O. lxiv., r. 11.**—A specially indorsed writ may be served at any hour of the day.—*Murray v. Stephenson*, L.R. 19 Q.B.D. 60; 56 L.T. 720; 35 W.R. 666.
- (vii.) **Ch. D.—Specific Performance—Relief Claimed by Pleading—Judgment O. xxxvi., r. 31.**—The defendant in an action for specific performance having by his pleading admitted that he was unwilling to complete, and failing to appear at the trial, the plaintiff cannot have judgment for rescission and forfeiture of the deposit instead of the judgment claimed by his pleadings.—*Stone v. Smith*, L.R. 35 Ch. D. 188; 56 L.T. 833; 35 W.R. 546.
- (viii.) **Q. B. D.—Summary Jurisdiction—Conduct of Prosecution—Summary Jurisdiction Act, 1848, ss. 12, 14.**—On the hearing of an information before Justices sitting as a Court of Summary Jurisdiction, the informant, or where a society is prosecuting, one of its officers, is entitled to conduct the case in person, and to examine and cross-examine the witnesses.—*Duncan v. Toms*, 56 L.J. M.C. 81; 56 L.T. 719; 35 W.R. 667.

- (i.) **Q. B. D.**—*Summary Jurisdiction—Appeal to Session—Double Notice—Summary Jurisdiction Act, 1879, s. 31, sub-ss. 2, 3.*—Two notices of an appeal to Quarter Sessions having been given within due time and the appellant having elected to proceed under the second which turned out to be bad; *held*, that the first remained good and the appellant could proceed under it.—*Reg. v. Recorder of Wolverhampton*, 35 W.R. 650.
- (ii.) **Ch. D.**—*Survivorship of Action—Trade Mark—Infringement.*—After the death of the plaintiff in an action for infringement of his registered trade mark the action survives to his legal personal representatives.—*Oakey v. Dalton*, 35 W.R. 709.
- (iii.) **Ch. D.**—*Taxation—Objections—Review of Certificate—Summons.*—Where the ground of reviewing a taxing master's certificate is that he has proceeded on a wrong general principle, and no specific items are objected to, and there has been no actual taxation, the Court may vary or discharge the certificate or summons.—*In re Castle*, 35 W.R. 621.
- (iv.) **Ch. D.**—*Third Party Procedure—Time—R.S.C., 1883, O. xvi., rr. 48, 50.*—An application by the defendant for leave to issue a third party notice should be made promptly; and, as a general rule, within the time limited for delivering the defence, and at latest before the close of the pleadings.—*Birmingham & District Land Company v. L. & N. W. Ry. Co.*, 56 L.T. 702.
- (v.) **C. A.**—*Third Party—Interrogatories—R.S.C., 1883, O. xvi., rr. 52, 53; O. xxxi., r. 1.*—Decision of Ch. D. (*see* Vol. 12, p. 76, ii.) reversed.—*Eden v. Weardale Iron Co.*, L.R. 35 Ch. D. 287; 56 L.J. Ch. 400; 56 L.T. 464; 35 W.R. 507.
- (vi.) **Ch. D.**—*Trial by Jury—Ancient Documents—Local Prejudice—R.S.C., 1883, O. xxxvi., rr. 2—10.*—An application by the plaintiff for a trial by a local jury refused, because (1) the issue depended partly on the examination of peculiar ancient documents, and (2) the plaintiff made no answer to evidence adduced in opposition to the application to the effect that in consequence of local prejudice the defendant would not have a fair trial by a jury.—*Shafto v. Bolckow, Vaughan & Co.*, 35 W.R. 686.
- (vii.) **Q. B. D.**—*Withdrawal of Juror—Breach of Agreement—Re-trial.*—Where a party to an action breaks an agreement on which a juror has been withdrawn the Judge at assizes may order a re-trial of the action.—*Thomas v. Exeter Flying Post Co.*, L.R. 18 Q.B.D. 822; 56 L.J. Q.B. 313; 56 L.T. 361; 35 W.R. 594.
See Copyright, p. 96, i. Landlord and Tenant, p. 102, iii.

Principal and Agent:—

- (viii.) **C. A.**—*Liability of Broker—Custom of Market.*—A custom of a market whereby a broker acting expressly as such, but not disclosing the name of his principal, is liable on the contract, may be proved in an action against the broker, and is not in contradiction of a written contract in which the broker is expressed to act "on account of owner."—*Pike v. Ongley*, L.R. 18 Q.B.D. 708; 56 L.J. Q.B. 373; 35 W.R. 534.
- (ix.) **C. A.**—*Representation of Agent for his Own Benefit—Liability of Principal.*—A principal is not liable in an action of deceit for the fraudulent representations of a servant or agent made, not for the general or special benefit of the principal, but for the servant's or agent's private ends, though the servant or agent was held out by the principal as the person to answer the enquiries in reply to which the fraudulent representations were made.—*The British Mutual Banking Co. v. The Charnwood Forest Ry. Co.*, L.R. 18 Q.B.D. 714; 35 W.R. 590.

- (i.) **C. A.**—*Scope of Authority—Representation by Secretary of Company.*—It is not within the authority of the secretary of a company to make representations as to moneys retained by the company and payable on completion of a contract to a contractor doing work for the company, and therefore the company is not estopped in an action by an assignee of moneys represented by the secretary to be so retained and payable from denying that such moneys were payable.—*Barnett, Hoares & Co. v. South London Tramways Co.*, L.R. 18 Q.B.D. 815 ; 35 W.R. 640.
- (ii.) **H. L.**—*Undisclosed Principal—Set-off of Debt Due from Agent.*—When a broker sells in his own name for an undisclosed principal the buyer on being sued by the principal cannot set off a debt due from the broker, unless in making the contract he was induced by the conduct of the principal to believe, and did in fact believe, that the broker was selling on his own account.—*Cooke v. Eshelby*, L.R. 12 App. Cas. 271 ; 56 L.T. 673 ; 35 W.R. 629.

Railway :—

- (iii.) **Q. B. D.**—*Passenger's Luggage—Special Contract—Railway and Canal Traffic Act, 1854, s. 7.*—The plaintiff was a season ticket holder on the defendants' line under a special contract, by which he undertook to abide by all the regulations of the company. One of such regulations was that the company would not be responsible for luggage unless addressed with the name and destination of the owner. *Held*, not just and reasonable.—*Cutler v. North London Ry. Co.*, L.R. 19 Q.B.D. 64 ; 56 L.T. 639 ; 35 W.R. 575.
- (iv.) **Ch. D.**—*Railways Clauses Act, 1845, s. 53—Substitution of New Road for Old—Danger.*—A railway company may be restrained from using an old road, the diversion of which has been authorised by their Act, until they have provided a sufficient new road in its place, although they have provided a new road, according to the plans authorised by the Act, which, however, proved dangerous to the public.—*A.G. v. Barry Dock and Ry. Co.*, 56 L.T. 559.

Registration :—

- (v.) **Ch. D.**—*Middlesex—Judgment—Foreclosure.*—A judgment for foreclosure absolute cannot be registered in the Middlesex Registry.—*Burrows v. Holley*, L.R. 35 Ch. D. 123 ; 56 L.J. Ch. 605 ; 56 L.T. 506 ; 35 W.R. 592.

Restraint of Trade :—

- (vi.) **Ch. D.**—*Validity of Agreement—Partial Enforcement.*—An agreement by a servant not to serve or interfere with any customer served or belonging at any time to his master, if it is not, on construction, limited to interference with persons who were customers during the employment of the servant, is separable, and can be enforced in respect of such persons.—*Baines v. Geary*, L.R. 35 Ch. D. 154 ; 56 L.T. 567.
- (vii.) **Ch. D.**—*Reasonableness—Costs—R.S.C., 1883, O. lxx., r. 9.*—A covenant in a deed of dissolution of partnership to retire "as far as the law allows" from the trade, is not unreasonable nor against public policy. In an action to enforce such covenant the costs, subsequent to reply, ought to be taxed on the higher scale.—*Davies v. Davies*, 56 L.J. Ch. 481 ; 56 L.T. 401 ; 35 W.R. 697.

Revenue :—

- (viii.) **Q. B. D.**—*Beer License—Substitute for Beer—4 & 5 Will. IV., c. 85, s. 17 ; 43 & 44 Vict., c. 20, s. 2 ; 48 & 49 Vict., c. 51, s. 4.*—The sale without a beer license of a liquor called "botanic beer" containing no malt or hops, and having 6 per cent. of proof spirit, is illegal.—*Howorth v. Minns*, 56 L.T. 316.

- (i.) **Q. B. D.**—*Customs and Inland Revenue Act, 1885, s. 11 (6)*—*Duty on Property of Bodies Corporate and Unincorporate — Exemption.*—The entrance fees and subscriptions of members of a members' club, being paid in consideration of the right to enjoy the benefits of the club, are not "funds voluntarily contributed," and duty is therefore payable on property acquired with the money so paid.—*Re Duty on the Estate of the New University Club*, L.R. 18 Q.B.D. 720.

Settlement.—*See Bankruptcy*, p. 90, iv. and v.

Settled Land :—

- (ii.) **Ch. D.**—*Infant Tenant for Life—Trustees—Notice—Settled Land Act, 1882, s. 2, sub-s. 8, 38, 45, 60.*—Where the guardians of an infant tenant in tail in possession have obtained an order to exercise the powers of a tenant for life, and there are no trustees of the settlement within the definition of the Settled Land Act, it is not necessary to have trustees appointed to receive notices from the tenant for life.—*Re Countess of Dudley and L. & N. W. Ry. Co.*, L.R. 35 Ch.D. 338; 56 L.J. Ch. 478; 35 W.R. 492.
- (iii.) **Ch. D.**—*Settled Land Act, 1882, ss. 21, 22, 25, 26, 33, 53, 56, 58—Improvements—Capital Moneys—Power of Trustees to Spend Income.*—A tenant for life may require improvements to be made out of capital moneys, although the trustees have power to make such improvements out of income. The fact that a tenant for life will derive a benefit from the exercise of a power under the Settled Land Act is not of itself sufficient to prevent him from exercising the honest discretion required by section 53.—*Re Lord Stamford's Estates*, 56 L.T. 484.

Sewers :—

- (iv.) **Q. B. D.**—*Vesting in Local Authority—Alteration of Sewerage—Liability for Expenses—Public Health Act, 1875, ss. 13, 15, 18, 150, 207.*—The owners of land built a street and formed a sewer which drained the houses. A new sewer having become necessary in consequence of a prohibition against the discharge of sewage in the old manner; held that the frontagers were not liable for the expense of making the new sewer.—*Bonella v. Twickenham Board of Health*; *Holmes v. Twickenham Board of Health*, L.R. 18 Q.B.D. 577; 56 L.J. M.C. 73; 56 L.T. 486; 35 W.R. 578.

Ship :—

- (v.) **Q. B. D.**—*Bill of Lading—Non-Delivery—Measure of Damages.*—Part of the goods comprised in a bill of lading having been placed in another ship, and arriving late, were accepted by the indorsees, and sold; held, that the indorsees retained their right of action for non-delivery, and that the measure of damages was the fall in value of the goods between the time when they ought to have been delivered, and that when they were in fact delivered.—*Smith v. Tregarthen*, 35 W.R. 665.
- (vi.) **Q. B. D.**—*Bill of Sale—Dumb Barge—Bills of Sale Act, 1874, s. 4.*—An assignment of a dumb barge is not within the Bills of Sale Act.—*Gapp v. Bond*, 35 W.R. 683.
- (vii.) **P. D.**—*Collision—Regulations for Preventing Collisions at Sea, Art. 3—Mersey Rules, r. 5.*—The starboard light of a ship was obscured by the cathead to the extent of from $2\frac{1}{2}$ to 3 degrees; otherwise her side-lights shewed an unbroken light over 10 points of the horizon. Held, that the Court was not bound to hold the vessel to blame for a collision. It is an infringement of the Mersey Rules to place the stern light abaft a house on the deck.—*The Fire Queen*, L.R. 12 P.D. 147.

- (i.) **H. L.**—*Collision—Infringement of Regulations.*—A ship is not to be deemed in fault for infringing one of the Regulations for preventing collisions, if the circumstances were such that a competent seaman, exercising reasonable care, could not have discovered that such regulation was in fact applicable.—*Baker v. Owners of Theodore Rand*, L.R. 12 App. Cas. 247; 56 L.J. P. 65; 56 L.T. 343.
- (ii.) **H. L.**—*Limitation of Liability—Right to Claim Against Fund in Court.*—Decision of C. A. (*see* Vol. 11, p. 97, i.) affirmed.—*The Ardandhu*, L.R. 12 App. Cas. 256; 56 L.J. P. 49.
- (iii.) **P. D.**—*Seamen—Agreement for Service—Breach by Owner—Damages.*—In an action by a seaman for breach of the stipulations in his agreement for service, the Court, in addition to the compensation provided by the Merchant Shipping Act, 1854, can award general damages for breach of the agreement, and for hardships incurred by the seaman through the vessel being employed for purposes other than those contemplated by the agreement.—*The Justitia*, L.R. 12 P.D. 145.
- (iv.) **P. D.**—*Wages—Master—Merchant Seamen (Payment of Wages) Act, 1880, s. 4—17 & 18 Vict., c. 104, ss. 187, 191.*—A master is not entitled to the double pay for delay in payment of wages recoverable by "seamen"; nor to wages up to the final settlement of his claim.—*The Arina*, L.R. 12 P.D. 118; 56 L.J. P. 57; 35 W.R. 654.
- (v.) **C. A.**—*Mortgage Action—Charge by Managing Owner—Receiver.*—The plaintiff having accepted bills of exchange drawn by the managing owner of a foreign ship in the belief that he was the sole owner, and having claimed to be an equitable mortgagee of the ship and her freight to secure his liability under the bills; held, that, as it had not been shewn that the amount of the bills had not been expended for the purposes of the ship, a receiver of the freight of the ship, which was then in an English port, ought to be appointed.—*Burn v. Herlofson*, 56 L.T. 722.
- (vi.) **C. A.**—*Mersey Dock Acts Consolidation Act, 1858, s. 230—Dock Rates.*—Vessels sailed from Glasgow to Liverpool partly laden, entered the Liverpool Docks, and completed their lading, discharging no cargo; they then proceeded to a port in India, there discharged and loaded a complete cargo, thence sailed for Liverpool, entered the docks, and discharged cargo, and then returned to Glasgow, partly laden or in ballast. Held, that the Mersey Docks Board were entitled to charge on such vessels rates as on vessels trading inwards from Glasgow and from India.—*Henderson v. Mersey Docks Board*, L.R. 19 Q.B.D. 123.
- (vii.) **C. A.**—*Mutual Association for Insurance—Liability of Part Owner of Ship not a Member.*—The part owner of a ship which his co-owner has insured in a mutual marine insurance association, is not liable as an undisclosed principal for sums payable in respect of the ship when he is not a member of the association, the policy and articles of association providing that losses were to be made good by members of the association.—*The United Kingdom Mutual Steamship Assurance Association v. Neville*, L.R. 19 Q.B.D. 110.
- (viii.) **P. D.**—*Pilotage—Charge—Order in Council, May 17, 1882.*—A pilot who brings a ship from Gravesend to the entrance of the Tilbury Docks, and thence into the docks, is not entitled to the special charge "for removing a vessel from moorings into a dry or wet dock," or to charge any sum other than the rate from Gravesend to Northfleet.—*The Clan Grant*, L.R. 12 P.D. 139; 56 L.J. P. 62; 35 W.R. 670.

- (i.) **P. D.**—*Compulsory Pilotage—London District—Exemption—Merchant Shipping Act, 1854, s. 379.*—A ship on a voyage from Liverpool to Hamburg, and obliged to put into the Thames for repairs, is exempt from compulsory pilotage in the London District.—*The Sutherland*, L.R. 12 P.D. 154.
- (ii.) **C. A.**—*Practice—Reasons of Nautical Assessors.*—Where in an action for collision the nautical assessors in the Admiralty Division have reduced their reasons into writing, parties appealing from the decision are not entitled to see, or have copies of, the reasons for the purpose of the appeal.—*The Banshee*, 56 L.T. 725.

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- (iii.) **C. A.**—*Lien for Costs—Property Recovered or Preserved—Solicitors Act, 1860, s. 28.*—At the trial the action was dismissed with costs to be paid by the plaintiffs to the defendants. On appeal the judgment was reversed, and the costs paid were ordered to be refunded. The plaintiffs having become bankrupts, *held*, that their solicitors were entitled to a lien on the costs directed to be repaid for the difference between their party and party costs and their solicitor and client costs of the appeal.—*Guy v. Churchill*, 35 W.R. 706.
- (iv.) **Q. B. D.**—*Costs—Perusing Title-Deeds—Solicitors Remuneration Act, 1881—General Order, August, 1882, Sched. II.*—A solicitor making advances to a client upon the security of real property and perusing for that purpose the title-deeds of the property, is not entitled to charge at the rate of 1s. per folio "for perusing."—*In re Robertson*, L.R. 19 Q.B.D. 1.
- (v.) **Ch. D.**—*Costs—Third Party Taxation—6 & 7 Vict., c. 73, ss. 37, 38, 40—Petition—R S.C., 1883, O. lxx., r. 1.*—Delivery by solicitors to a mortgagee of their bill of costs relative to the sale of the mortgaged property to the solicitors of the mortgagor who was selling the property, the mortgagor's solicitors having asked for delivery of the bill in the scope of their employment, *held*, to be a sufficient delivery to the person chargeable, so that the bill could not be withdrawn. An application for taxation having been made by petition the same costs were allowed as on a summons adjourned into Court.—*In re Kellock*, 35 W.R. 695.
- (vi.) **Ch. D.**—*Costs—Purchase—General Order, August, 1882, Sched. I., Part I., r. 11.*—A vendor's solicitor is not entitled to the scale fee for negotiating a sale where a surveyor has been employed and paid for fixing the price. When the purchaser of leasehold property is informed that the title consists only of the lease and does not require an abstract or copy of the lease, the vendor's solicitor is not entitled to the scale fee for deducing title.—*Re Harris, Powell, and Goodale*, 56 L.T. 477.
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- (i.) **Ch. D.—Taxation—Payment—6 & 7 Vict., c. 73, s. 41—Attorneys and Solicitors Act, 1870, s. 4.**—There cannot be such payment of a bill of costs as to preclude taxation, unless a bill has been delivered so that the client can see the items.—*Re Stogden*; *e. p. Baker*, 56 L.J. Ch. 420; 56 L.T. 355.

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- (ii.) **Q. B. D.—Predecessor—Settlor—Successor—16 & 17 Vict., c. 51, s. 2.**—A marriage settlement recited that it was agreed that the father of the intended husband should give his son £6,000, which was to be repaid in the event of the marriage not taking place; it further recited that it was agreed that the trustees of the settlement should hold the said sum on trust, to transfer the same to the father in case the marriage should not take place before a certain day, and after the marriage on trust for the husband, the wife and their children successively. *Held*, that on the death of the husband, the wife's interest was derived from her father-in-law as predecessor or settlor, and not from her husband.—*A.-G. v. Maule*, 56 L.T. 611.

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- (iii.) **Ch. D.—Fancy Word—Patents, Designs, & Trade Marks Act, 1883, ss. 64, 74.**—The word "Jubilee" cannot be registered as a trade mark for paper as a fancy word.—*Towgood Brothers v. Alexander Pirie & Sons, Limited*, 56 L.T. 394; 35 W.R. 729.
- (iv.) **P. C.—Exclusive Right to User.**—In the absence of any legislation for the registration of trade marks, as soon as a trade mark has been so employed in the market as to indicate to purchasers that goods of a particular class to which it is attached are the manufacture of a particular person, that person acquires an exclusive right to use it on goods of that class, but not of a totally different class, and no one else may use it, or a part of it, if purchasers may be thereby deceived as to the manufacture of the goods they buy.—*Somerville v. Schembri*, 56 L.T. 454.
- (v.) **Ch. D.—Infringement.**—The plaintiffs having registered the word "Sanitas" as a trade mark, obtained an interlocutory injunction to restrain the defendant, who was selling under the name of "Condi-Sanitas" goods similar to the plaintiffs', from using the word "Sanitas" in conjunction with "Condi," or in any other way which would infringe the plaintiffs' trade mark.—*The Sanitas Company v. Condy*, 56 L.T. 621.

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- (vi.) **Ch. D.—Exclusive User.**—The use for four years of the word "Guaranteed" in connection with an article, meaning that the seller guaranteed that it should wear for twelve months, does not give the persons using it such an exclusive right to the word as to entitle them to restrain other persons from using the same word with the same meaning in connection with a similar article.—*Symington & Co. v. Footman, Pretty & Co.*, 56 L.T. 696.
- (vii.) **C. A.—Injunction—Patents, Designs, and Trade Marks Act, 1883, s. 77.**—A person selling wine consigned to him by a French merchant with a label to which the consignor has established an exclusive right in France, cannot unless the label is registered in England as a trade mark, in the absence of evidence to shew that the name and brand shewn on the label has become associated in England with his own wine, prevent

another person from selling wine with the same label consigned by another French merchant.—*Goodfellow v. Prince*, L.R. 35 Ch. D. 9; 56 L.J. Ch. 545; 56 L.T. 617; 35 W.R. 488.

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- (ii.) **Ch. D.**—*Appointment of New Trustees—Settled Land Act, 1884, s. 38—Conveyancing Act, 1881, s. 31.*—It is doubtful whether new trustees for the purpose of the Settled Land Act can be appointed out of Court under the Conveyancing Act.—*Re Wilcock*, 56 L.T. 629.
- (iii.) **C. A.**—*Fraudulent—Right to Follow Fund—Purchaser without Notice.*—A trustee who accepts the transfer of stock by his co-trustee to replace a part of the trust fund misappropriated by the latter, gives up his right of action against him, and in an action to recover the stock for the benefit of another trust fund from which it has been stolen must be treated as a purchaser for value without notice.—*Taylor v. Blakelock*, 56 L.J. Ch. 390.
- (iv.) **Ch. D.**—*Refusal to Sue—Right of Cestui-que-trust to Sue in his Own Name.*—Testator bequeathed to A. a legacy. A. settled £8,000, part of the legacy, on his children, and appointed B. and C. trustees of the settlement. The £8,000 was paid by the testator's executors to B. on his sole receipt, and was misappropriated by B., who became bankrupt. D., one of A.'s children, sued the executors, C., and B.'s trustee, alleging that C. had refused to sue. *Held*, that the circumstances were such that D. was entitled to sue in his own name, but that all the *cestuis-que-trust* ought to be made defendants.—*Meldrum v. Scorer*, 56 L.T. 471.
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- (vi.) **Ch. D.**—*Sale by Executor—Twenty Years after Death of Testator.*—The rule that on a sale under a power to sell for payment of debts more than twenty years after the testator's death, the vendor may be required to shew the existence of debts, does not apply to an executor selling leaseholds of which he has retained possession, to the bequest of which he has not assented.—*In re Whistler and Richardson*, 35 W.R. 662.
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- (vii.) **Q. B.**—*Injury to Pipes—Working of Mine—Deposit of Plans—Waterworks Clauses Act, 1847, ss. 19, 20.*—The deposit of plans of their underground workings is a condition precedent to the right of a waterworks company incorporated under the Waterworks Clauses Act, 1847, to recover for injuries to their pipes caused by the usual working of a subjacent mine.—*South Staffordshire Waterworks Co. v. Mason & Sons*, 56 L.J. Q.B. 255.

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- (i.) **Ch. D.**—*Ademption*.—A testatrix bequeathed a sum of £7,500 “which I believe is left under uncle Price’s will to me.” At the date of her will she was entitled in reversion to shares in two funds, one under her uncle’s will, and one under a settlement made by him; when the reversion fell in she received the shares which amounted to £7,500. *Held*, that the legacy was not adeemed, but was effectual as far as the shares so received could be traced.—*Mann v. Knapp; re Kenyon*, 56 L.T. 626.
- (ii.) **Ch. D.**—*Bequest of Business—Bequest over on Death of Legatee to Next-of-Kin*.—Bequest to three of leasehold premises and the plant, stock-in-trade and goodwill of a business carried on there, with a proviso that on the death of any of the three legatees his share in the premises, stock-in-trade and goodwill should go to his next-of-kin. The legatees carried on the business for nine years and increased the value of the stock-in-trade. One of them having agreed to sell his share to another; *held*, that the vendor was entitled to receive the whole purchase-money, and that no part need be set aside for the persons who would be entitled under the gift to next-of-kin.—*Conolly v. Conolly*, 56 L.T. 304.
- (iii.) **Ch. D.**—*Charitable Gift—New Clock for Church—Choir Fund*—43 Geo. III., c. 108.—Gift of residuary real and personal estate on trust for conversion and for payment of residue to the vicar and churchwardens of X. “to be applied by them towards the choir fund or a new clock for the tower, according to the discretion of my said trustee.” *Held*, that the gift of pure personalty was good, but that if impure personalty bad as regards the choir fund, but good as regards the new clock; and that the whole of a sum found by the Chief Clerk to be the reasonable cost of a new clock might be paid out of impure personalty.—*In re Hendry; Watson v. Blakeney*, 85 W.R. 730.
- (iv.) **Ch. D.**—*Construction—Conversion—Election to take as Real Estate*.—Devise of a freehold house after death of testator’s widow to each of his three children; direction that on death of any of the children without issue his house should be sold and the proceeds paid to survivors. Two having died, the survivor received the rents of all the houses and shortly before his death gave the title deeds of the houses to his solicitor with instructions to prepare a deed of gift of all his property to a niece. He died before the deed was executed. *Held*, that the houses were converted out and out by the testator’s will, and that the surviving son had elected to take them as real estate.—*Potter v. Dudeney*, 56 L.T. 395.
- (v.) **Ch. D.**—*Construction—Charity—Condition*.—A bequest was made to a charity upon a condition, with a gift over on non-compliance with it. *Held*, that the condition was to be construed as a trust, and that the charity, having accepted the condition, was entitled to the gift.—*Shuldham v. Royal Lifeboat Institution*, 35 W.R. 710.
- (vi.) **Ch. D.**—*Construction—Condition Precedent*.—A testator bequeathed his personal estate to such persons as should within one year from his death establish their right thereto as his next-of-kin, with a gift over in default. An order for a limited administration, with an inquiry as to next-of-kin was made soon after the testator’s death. The persons who were next-of-kin did not bring in a claim within the year. *Held*, that the gift over took effect.—*Re Hartley; Steadman v. Dunster*, L.R. 34 Ch.D. 742; 56 L.J. Ch. 564; 56 L.T. 565; 35 W.R. 624.
- (vii.) **C. A.**—*Construction—Married Woman—Restraint on Anticipation*.—Decision of Ch. D. (see Vol. 12, p. 50, v.) affirmed.—*Acason v. Greenwood*, L.R. 34 Ch. D. 712; 56 L.J. Ch. 511; 56 L.T. 350; 35 W.R. 560.

- (i) **Ch. D.**—*Construction—Gift to Children of Deceased Person—Grandchildren.*—A testator made separate gifts, similarly worded, in favour of the children of two deceased brothers, and a deceased sister. At the date of the will there were, to the testator's knowledge, no children, but only grandchildren, of the sister, and children of both the brothers. *Held*, that the grandchildren of the sister were entitled under the gift in favour of her children.—*Lord v. Hayward*, 35 W.R. 663.
- (ii) **C. A.**—*Construction—Word "Family"—Legacy to Trustees for Services.*—Decision of Ch. D. (*see* Vol. 12, p. 51, iii.) affirmed.—*Jones v. Mason; re Muffett*, 56 L.J. Ch. 600; 56 L.T. 685.
- (iii) **Ch. D.**—*Construction—Remoteness.*—Bequest on trust for the children of A. to be vested interests in the case of sons on their attaining twenty-five, and in the case of daughters on their attaining that age or marrying, with powers of maintenance and advancement, and a gift over in case all such children should die without taking a vested interest. *Held*, that only children born at the death of the testator were entitled, so that the gift was not void for remoteness.—*Re Coppard; Howlett v. Hodson*, L.R. 35 Ch. D. 350; 56 L.J. Ch. 603; 56 L.T. 359; 35 W.R. 473.
- (iv) **Ch. D.**—*Construction—Illegitimate Children.*—Bequest to the testator's natural children by M. nominatim, and to all other children to be born of M. before the testator's death. *Held*, that children of the testator by M., whom he never married, born after the date of the will, were entitled.—*In re Hastie's Trusts*, 35 W.R. 692.
- (v) **Ch. D.**—*Construction—Children—Issue of Deceased Child—Vested Indefeasible Interests.*—Gift of residue on trust to pay annuity to widow and accumulate the balance of the income; on death of widow or expiration of twenty-one years from death of testator, which should first happen, the residue and accumulations to be divided among testator's children in equal shares, "the issue of any deceased child to take his, her, or their parent's share." *Held*, that all the children who survived the testator took vested indefeasible interests.—*Bragger v. Bragger*, 56 L.J. Ch. 490; 56 L.T. 520.
- (vi) **Ch. D.**—*Construction—Gift over—"Then."*—Bequest of residue on trust for D. for life, and from and after her death on trust for all the children of J., "and the lawful issue of such of them as may be then dead." D. and all the children of J. predeceased the testator. Only one of the children of J. was ever married; she survived D., and left children. *Held*, that the word "then" referred to the death of D., and that there was an intestacy.—*Grant v. Heysham; in re Milne*, 56 L.J. Ch. 543.
- (vii) **Ch. D.**—*Execution—Will made in Scotland—Validity—24 & 25 Vict., c. 114, s. 2.*—English leaseholds pass under the will, made in Scotland, of a domiciled Englishman, the execution of which is valid by Scotch, but invalid by English, law.—*Carlton v. Carlton*, 35 W.R. 711.
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- (ix) **P. D.**—*Married Woman—Assent of Husband.*—A husband cannot after his wife's death revoke his assent to her will.—*Chappell v. Charlton*, 56 L.J.P. 73.

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- (ii.) **P. D.**—*Probate—Married Woman—General Grant.*—The limitation previously inserted in the probate of the will of a married woman ought no longer to be required, and the Court will make a general grant.—*In the goods of Price*, L.R. 12 P.D. 137; 56 L.J. P. 72; 35 W.R. 596.
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